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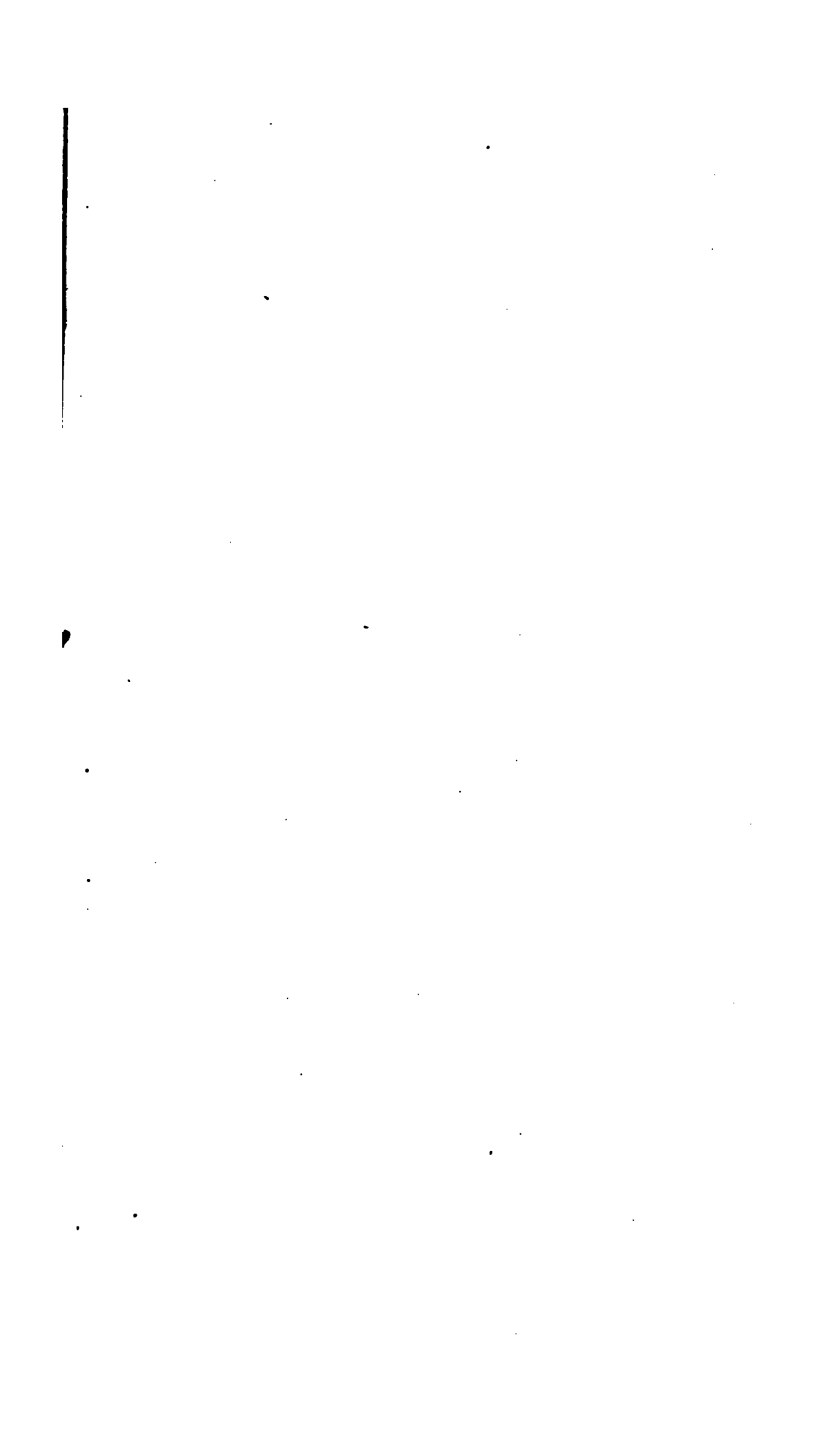








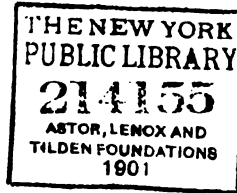




A
PRACTICAL TREATISE
UPON THE
CRIMINAL LAW AND PRACTICE
OF THE
STATE OF NEW YORK,
WITH AN
APPENDIX OF PRECEDENTS,
DESIGNED FOR THE USE OF THE LEGAL PROFESSION, AND ALL PUBLIC
OFFICERS ENGAGED IN THE ADMINISTRATION OF CRIMINAL
LAW, AND AS A TEXT-BOOK FOR STUDENTS.
IN TWO VOLUMES.
VOL. I.

BY JOHN H. COLBY,
COUNSELLOR AT LAW.

ALBANY:
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1868.



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AND BINDERS, ALBANY, N. Y.

TO THE
HON. ABRAM B. OLIN,
A
JUSTICE OF THE SUPREME COURT
OF THE
DISTRICT OF COLUMBIA,
THIS WORK
IS RESPECTFULLY DEDICATED,
IN TESTIMONY
OF THE SENSE WHICH THE AUTHOR ENTERTAINS
OF THE
KINDNESS HE HAS UNIFORMLY EXPERIENCED AT HIS HANDS,
NO LESS
THAN OF THE EXALTED ESTIMATION IN WHICH
HE HOLDS
THE TALENTS, LEARNING AND INTEGRITY WHICH HAVE
CHARACTERIZED HIS PROFESSIONAL LIFE.



P R E F A C E .

THE object of the present work is to present, in a practical treatise, a connected view, not only of the main features of the criminal law as known in this State, but also of the method of the criminal procedure before the different officers and courts exercising criminal jurisdiction in the State.

The author, during his professional practice, and more especially while holding the office of district-attorney in one of the counties of this State, has often felt the necessity of a compact, reliable hand-book upon the criminal practice. The work of Mr. BARBOUR, which was most in use, was more expressly designed for the guide of justices of the peace, and instruction in such criminal proceedings as were carried on before them and in their courts, and was not expected to be complete in its details of the practice in courts of record upon the trial of indictments. Mr. ARCHBOLD's "Criminal Practice and Pleading" was originally written and designed to illustrate the practice in the courts of England, and, by reason of various statutory enactments in this State differing from the practice of the common law and the statutes of England, it did not meet the wants of the profession. Again, the works of Mr. WHARTON upon the criminal law, and the notes by Mr. WATERMAN subjoined to the text of ARCHBOLD, although the result of extended labor and great patience and care in their preparation, were too cumbersome for general use, and embraced a variety of statutory enactments by the Legislatures of other States, which had no application to the practice in this State, besides containing many decisions made by the courts of other States, which either interpreted such special enactments, or were repugnant to the decisions which had been made by our courts upon various questions arising upon the criminal practice in this State.

In the arrangement of that portion of this work embraced in Book I, treating of the procedure in criminal prosecutions, the author has endeavored not only to ensure accuracy and brevity, but also to arrange the order of the subjects as they would be most likely to occur in an actual case of practice. Such matters as are most frequently determined without the aid of a court of record, and over which the inferior judicial officers and tribunals exercise jurisdiction, are mentioned first, and these are followed in consecutive order by the proceedings had and taken from the arrest of an offender for the most trivial misdemeanor down to the infliction of the death penalty for a capital crime; and the attempt has

been made to so arrange the subjects spoken of that a person having occasion to refer to the book will, upon an examination of the particular question under consideration, find upon the pages immediately following a discussion of the topics, concerning the next step to be taken by either party to the action in its actual progress. Convenience of arrangement has throughout been carefully looked after; for brevity and accuracy are often useless in a hand-book designed to be used upon the necessity of the moment if the matters spoken of are so disarranged that they cannot be readily found.

The arrangement of Book I is devoted entirely to a discussion of the criminal procedure. In the first chapter, the persons capable of committing crimes, and the various grounds of exemption from punishment, are considered. Chapter two embraces the degrees of guilt; those who are principals and accessories, and persons attempting to commit offences. Chapter three enumerates the powers and duties of the several judicial officers and courts possessing criminal jurisdiction in the State. Chapter four consists of a discussion of the law relative to arrests upon criminal charges—by whom, for what offences, when, where, and in what manner—by public officers and private individuals, with and without process; containing, also, a section relative to the arrest of fugitives from justice by requisitions upon the governors of other States. Chapter five embraces the questions of sureties of the peace and of good behavior, including the subsequent proceedings in courts of sessions upon the recognizance. In the sixth chapter, the practice upon the different kinds of search warrants is treated of. In chapter seven is considered the law and practice upon coroners' inquests, including investigations by coroners into the origin of fires. Chapter eight is devoted to a discussion of the practice in bastardy proceedings, and appeals to the court of sessions from orders of filiation made in bastardy cases. Chapter nine contains a discussion of the practice in summary convictions, without the intervention of a jury. In chapter ten, the arrest and examination of offenders, their commitment for trial, and letting them to bail, and trials in courts of special sessions, are very fully considered. The subjects discussed in this chapter are divided into three general subdivisions, and include, first, the proceedings from the complaint until the return of the warrant of arrest; second, the proceedings subsequent to the return of the warrant, where the offence is not triable in a court of special sessions; and, third, the proceedings subsequent to the return of the warrant, where the offence is triable before a court of special sessions. Chapter eleven embraces the question of the removal, by *certiorari*, of the proceedings and judgment, upon conviction in the courts of special sessions and police courts, into the courts of sessions. In the twelfth chapter, the practice and proceedings in courts of oyer and terminer and courts of sessions upon the finding, presentment and trial of indictments are very fully considered. A comprehensive view of the

entire practice in a court of record, from the organization of the court down to its final adjournment, is given in all the various details that can arise upon a prosecution for a felony or misdemeanor. This chapter embraces five general subdivisions, viz.: Section one, treating of the proceedings from the organization of the court down to the finding and presentment of the indictment; section two, of the proceedings from the presentment of the indictment down to the trial; section three, of the proceedings from and including the trial down to and including the verdict; section four, of the sentence and punishment; and section five, of the subsequent miscellaneous proceedings. Chapter thirteen relates to the various methods of obtaining a review of a criminal conviction by writs of error and *certiorari*; the making of bills of exception; staying the sentence, and motions for a new trial, and embraces a full discussion of the law and practice upon these subjects.

In Book II, the first and second chapters respectively consider the law as applicable to the different felonies and misdemeanors. These chapters contain an alphabetical list of the various felonies and misdemeanors, with a particular reference to the statutes and laws creating them; and, in the subsequent discussion of indictable offences, the felonies and misdemeanors, for convenience, are also arranged alphabetically. The third chapter of the second book relates to the form and contents of the indictment, and the legal rules of criminal pleading as applied to an indictment. The fourth chapter consists of a discussion of the principles of evidence as applied to the administration of the criminal law, and is entitled "Of Criminal Evidence."

It has been a task of no small magnitude to explore the mass of criminal authorities, and endeavor to select only such as were necessary and useful, and arrange them in a systematic manner, and with such notes and observations as would not only aid those engaged in the practice of the profession, as a ready hand-book for reference, but, at the same time, be of value as a text-book for the student and younger members of the profession.

The author cannot but acknowledge the assistance he has derived from the comprehensive notes of Mr. WATERMAN to the text of ARCHBOLD; and if this work, as a first effort in the line of authorship, should prove of any assistance to those public officers whose business it is to aid in the administration of public justice, or serve to lighten the labors of the legal profession, it is all the author expects.

J. H. C.

TRoy, N. Y., 1868.



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CRIMINAL PRACTICE

IN THE

STATE OF NEW YORK.

BOOK I.

CHAPTER I.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

GENERAL REMARKS.

Section I.—EXEMPTION FROM PUNISHMENT ON THE GROUND OF INFANCY.

II.—EXEMPTION FROM PUNISHMENT ON THE GROUND OF INSANITY.

III.—EXEMPTION FROM PUNISHMENT FOR ACTS DONE IN SUBJECTION TO THE POWER OF OTHERS.

IV.—EXEMPTION FROM PUNISHMENT ARISING FROM IGNORANCE OR MISTAKE OF FACT.

V.—AMBASSADORS, PUBLIC MINISTERS AND CONSULS.

THAT eminent jurist, Sir William Blackstone, in discussing the question what persons are or are not capable of committing crimes; or, which is the same thing, who are exempted from the censures of the law upon the commission of those acts which in other persons would be severely punished, lays down the general rule that no person shall be excused from punishment for disobedience to the laws of his country, except such as are expressly defined and exempted by the laws themselves.¹

The same author further says, that all the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to the single consideration of the want or defect of will.²

There are three cases in which the will does not join with the act: first, where there is a defect of understanding; second, where there is understanding and will sufficient residing in the

¹ 4 Blac. Com., 20.

² Idem.

party, but not called forth and exerted at the time of the action done. Here the will sits neuter, and neither concurs with the act or disagrees with it. Third, where the action is constrained by some outward force and violence.¹

We shall proceed to discuss the several cases in which there is such a deficiency of will in the party by whom the act is committed, as will amount to a plea and excuse that may be urged in his behalf as a sufficient ground of exemption from punishment.

SECTION I.

EXEMPTION FROM PUNISHMENT ON THE GROUND OF INFANCY.

Infancy, or non-age, properly falls under the first class mentioned above, that is, where there is a defect of understanding. An infant is a person under the age of twenty-one years; but the question as to whether or not they are to be punished by criminal prosecution, seems to depend upon the fact whether or not they are under the years of discretion.²

The case of the King *agst.* William York, tried at the Michaelmas term, in 1748,³ has long been the leading case on the liability of infants for crimes. In that case it was held that a child of ten years of age might be guilty of murder if it knew what it was doing. In that case the court observed there are many crimes of the most heinous nature, such as in the present case; the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and, therefore, though the taking away the life of a boy ten years old may savor of cruelty, yet, as the example of this boy's punishment may be a means of deterring other children from the like offences, and as the sparing of this boy merely on account of his age will probably have a quite contrary tendency, in justice to the public the law ought to take its course, unless there remains any doubt touching his guilt.

On the trial or examination of an infant for a crime, he has a right to appear and defend himself in person or by an attorney,

¹ 4 Blac. Com., 20.

² 4 Blac. Com., 22. 1 Hawk. P. C., 2.

³ 1 Foster's Crown Law, 70.

and it is error for the court to assign him a guardian and try the case on a plea pleaded for him by the guardian.¹

The discussion of this subject presents itself under the following sub-divisions :

1. *Their liability below the age of seven years.*
2. *Their liability between the ages of seven and fourteen.*
3. *Their liability above the age of fourteen.*

1. It is laid down by the elementary criminal writers that an infant under the age of seven years cannot be guilty of any crime, whatever circumstances may appear proving his discretion, for it is a presumption of law that he cannot have discretion, and no averment can be received against that presumption.² And it has been held in this State that a child of seven is incapable of committing crime.³ Although it would seem that the maxim, *malice supplies age*, applies as well to one under as one over the age of fourteen years.

2. Whatever may be the law relative to persons under the age of seven, all authorities agree that at that age criminal responsibility commences, and subject to the presumption in favor of infants, they are amenable for any and all crimes committed by them, whether felonies or misdemeanors.⁴

The presumption mentioned in favor of the infant is, that he has not knowledge of good and evil, and did not know that he was doing wrong.⁵ This presumed incompetency to discern evil is technically termed *doli incapax*, and the distinction in relation to the conviction and punishment of infants below seven years of age, and between the ages seven and fourteen, rests in this, that although the law regards them both as *doli incapax*, no evidence is admissible to contradict this presumption in the case of infants below seven years ; while in the case of infants between the ages of seven and fourteen it is competent to prove that the

¹ 3 Leigh, 743.

² 1 Hawk, P. C., 2; 4 Blac. Com., 22, 23; 1 Hale, P. C., 27; Plowden 19 s; Mirror, ch. 4, § 16; Dalton's Just., ch. 147, p. 334; Arch. Cr. Pr., 10, 11; 1 Russ on Cr., 2; Peo. v. Townsend, 3 Hill, 480.

³ Walker's Case, 5 City H. Rec., 137.

⁴ 1 Lead. Cr. Cases 71, note 2.

⁵ 4 Blac. Com., 23; Rex v. Owen, 4, C. & P. 236; 5 City H. Rec., 137; 1 Whee. Cr. Cases, 230.

infant has sufficient mental capacity, and may therefore be guilty of crime. The ground upon which this presumption is overcome, is found in the maxim *malitia supplet aetatem* (malice supplies age), and if the evidence be sufficiently strong and clear, beyond all doubt and contradiction, that the offender is *doli capax*, that is, able to discern between good and evil, he may be convicted and suffer death.¹

In this State, where on a charge of felony against an infant under the age of fourteen years and over the age of seven, no proof of his capacity to commit crime was given, it was held that the presumption was in his favor, and he was entitled to an acquittal.² The malicious intent and guilty knowledge that the prisoner was doing wrong must be proved from the evidence, and cannot be presumed from the mere commission of the act.³

Although it has been said that as his age approximates to seven the inference in his favor becomes greater, and as it approximates to fourteen the inference in his favor is less.⁴

The fact of guilty knowledge may often appear from the circumstances of the case, as if the prisoner conceals himself, denies the act, attempts to escape, or in any way shows a consciousness that he was doing wrong, and was capable of discerning good from evil.⁵

By the common law it was had that an infant under fourteen years of age was conclusively presumed to be incapable of committing the offence of rape⁶; but in this State the presumption is not conclusive, and may be overcome by showing that the party charged had attained to puberty.⁷

It was also held in this State that a boy under fourteen years of age, indicted for rape, being presumed to be physically incompetent to commit the crime, could not be convicted of an assault with attempt to commit a rape, though he might be convicted of a simple assault and battery.⁸

¹ 4 C. & P., 236; 1 Whee. Cr. Cases, 230; 1 Ashm., 248; 1 Hale, 25, 27; 4 Blac. Com., 23; 1 Russ on Cr., 3.

² *Peo. v. Davis*, 1 Whee. Cr. Cases, 230.

³ *Rex v. Smith*, 1 Cox C. C., 260.

⁴ *Walker's Case*, 5 City H. Rec., 137.

⁵ *State v. Doherty*, 2 Overton, 80; *Stoges' Case*, 5 City H. Rec., 177; 1 Hale P. C., 27; 1 Russ on Cr., 3; 4 Blac. Com., 24; Arch Cr. Pr., 11.

⁶ 3 C. & P., 396; 7 Id., 582; 8 Id., 736; 9 Id., 866, 118.

⁷ *Peo. v. Randolph*, 2 Park C. R., 174.

⁸ Id., 213.

3. The authorities all agree, with a single class of exceptions, that entire criminal responsibility commences at the age of fourteen years, and the presumption of incompetency ceases.¹

The exception referred to is when the infant is privileged as to common misdemeanors by an omission, as not repairing a bridge, or a highway, or other similar offences; for not having the command of his fortune until twenty-one, he wants the capacity to do those things which the law requires.²

Our statute also makes an exception in the case of embezzlement committed by apprentices and persons within the age of eighteen years.³

The principles above set forth may be summed up as follows :

Infants below the age of seven have not legal capacity to commit crime; between the ages of seven and fourteen they have possible capacity, the burden of proof resting upon the prosecution to show such capacity; above the age of fourteen they have legal capacity unless something else other than non-age intervenes to show a want or defect of will.

SECTION II.

EXEMPTION FROM PUNISHMENT ON THE GROUND OF INSANITY.

The second case of a deficiency in will, which excuses from the guilt of crimes, arises from a defective or vitiated understanding, viz: in an idiot or lunatic.⁴ No question, that ever can come before a court and jury, is so embarrassing to consider and with precision to determine, as cases of real or alleged insanity. What deprivation of reason ought to protect the unfortunate from punishment, and what ought not to cover them as a shield from suffering the reward of crime, is a question of great importance and greater difficulty.⁵

Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane and accountable for his

¹ 1 Lead. Cr. Cases 75, note 3.

² 4 Blac. Com., 22; 1 Hale's P. C., 20, 21, 22.

³ 2 R. S., 678, § 59.

⁴ 4 Black. Com., 24.

⁵ *Peo. v. Tripler*, 1 Whee. Cr. Cas., note.

actions.¹ But if there be a defective or vitiated understanding, there is no consent of the will; and this is either natural, accidental or acquired, and is permanent or temporary and has been divided by the writers upon criminal law into three classes, viz:

(a) *A nativitate vel dementia naturalis*—which is idiocy or natural fatuity.

(b) *Dementia accidentalis vel adventitia*—which is such as have had understanding but have lost the use of their reason by disease, grief or other accident.²

(c) *Dementia affectata*—which is a voluntary insanity produced by intoxication, or other like causes, which places a person in a temporary frenzy.

We will follow the classification above laid down, and discuss each in its order.

(a) An idiot is one who is of non sane memory from his birth, by perpetual infirmity, without lucid intervals,³ and hath had no understanding from his nativity.⁴ It is laid down that a man is not an idiot if he hath any glimmering of reason so that he can tell his parents, his age, or the like common matters;⁵ but a man who is born deaf, dumb and blind, is looked upon by the law in the same state as an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.⁶

An idiot is not of course capable of committing a crime, but to make a lack of natural sense a valid excuse, we are not to suppose that the party must, in all cases, come within the strict definition given above. One may possess such a glimmering of reason as to show that he is not, strictly speaking, an idiot, and still not have sufficient discretion and judgment to enable him to distinguish between good and evil. The question then to be determined in regard to such persons is, whether they possess enough reason to make them capable of malicious discretion.⁷

¹ *Lake v. Peo.*, 1 Park., 495; 3 C. & K., 188; 6 Cox, C. C., 385; 4 Id., 149; 5 John., 144; 4 Cow., 207; *Peo. v. Robinson*, 1 Park., 649; *Peo. v. Kirby*, 2 Id., 28.

² 1 Blac. Com. 304.

³ Co. Lit. 247.

⁴ 1 Blac. Com. 303.

⁵ Id.; F. N. B. 233.

⁶ Id.; Co. Lit. 42; Fleta, b. 6, c. 40.

⁷ 1 Arch. Cr. Pl. § 4, note.

The question, however, whether the accused is an idiot or not, is a question of fact for the jury, and it is for them to determine whether the accused has the use of understanding sufficient to enable him to distinguish good from evil.¹

(b) In this class of cases commonly called insanity, when the loss of reason is permanent, constant and total, it is called madness, and when it is temporary, the subject being only afflicted at times, enjoying lucid intervals, when his reason returns, it is called lunacy.² Besides this general classification adopted by the older writers, the modern authors upon medical jurisprudence,³ in their investigations into the question of insanity, considered as a legal defence, have bestowed great care and labor in classifying the different cases of insanity, and describing their attendant symptoms and peculiarities, and the reader who desires to study this interesting branch of the criminal law, is referred to the later works upon medical jurisprudence.⁴

The rules recognized in governing pleas of insanity, are different from what they were in the days of the earlier writers. The improvements in the science of medical jurisprudence, a more enlarged benevolence, and a clearer sense of Christian obligation have relaxed the cruel severity of the earlier doctrines.⁵

A controlling case upon the question of insanity, as a defence for the commission of crime, is that of Rogers.⁶ The court there laid down the rule, that a party indicted is not entitled to acquittal on the ground of insanity if, at the time of the alleged offence, he had capacity and reason enough to enable him to distinguish between right and wrong, and understood the nature, character and consequences of his act, and had mental powers sufficient to apply that knowledge to his own case; that when the delusion of a party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act; nor is a party responsible for an act done under an uncontrollable impulse,

¹ 1 Russ. on Cr. 6; Bac. Abr. Idiots, a.; Bro. Idiot L. Dy. 25; Moor, 4 Pl. 12; F. N. B. 233.

² 1 Arch. Cr. Pl. § 5, note.

³ Wharton & Steele's Med. Juris. 75, et seq.

⁴ Vide Beck, Guy, Dean, Whar. & Steele on Med. Juris.

⁵ 1 Arch., Cr. Pl., § 5, note, 7th ed.

⁶ Com. v. Rogers, 7 Met., 500; more fully in pamphlet of Rogers' trial.

which is the result of mental diseases.¹ The same doctrine has been held in this State, that when insanity is set up as a defence the single question is whether, at the time of committing the act, the person was laboring under such mental disease, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing wrong.²

Where insanity is alleged as a defence to the indictment, the test is whether, at the *time of committing the act*, he was laboring under such mental disease as not to know the nature and quality of the act he was doing, or that it was wrong;³ for where the lunatic has lucid intervals the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his malady.⁴

The question, as to whether the prisoner is insane or not at the time of the trial, is regulated by statute, and will be spoken of hereafter;⁵ and the finding of a jury upon a preliminary issue to the trial, as to whether the prisoner be sane at the time of the trial, (the statute providing that no insane person shall be tried) cannot be taken into consideration upon the question of insanity set up as a defence upon the trial of the indictment itself.⁶

Independent of the common law doctrine, the Revised Statutes declare that no act done by a person, while in a state of insanity, can be punished as an offence.⁷

(c) The third species of insanity, viz : that which is acquired or voluntary, is looked upon by the law as an aggravation of the offence, rather than as an excuse for criminal misbehavior,⁸ and the law holds a person responsible for a criminal act, though at the time he was intoxicated to such an extent as to be unconscious of what he was doing.⁹

Voluntary intoxication can form no excuse or immunity for

¹ Com. v. Rogers, 7 Met. 500; more fully in pamphlet of Rogers' trial.

² Clark's case, 1 City H. Rec., 176; Bolls, Id., 2 Id., 85; Peo. v. Pine, 2 Barb., 566; Peo. v. Sprague, 2 Park., 43. Vide, 2 Green's Ev., § 373; 10 Clark & Fin, 210; 9 O. & P., 525; see Peo. v. Lake, 2 Park., 215.

³ Id.; Freeman v. Peo., 4 Den., 9; Willis v. Peo., 5 Park., 621.

⁴ 1 Russ. on Cr., 6; 1 Hale, P. C., 33, 34; 3 Stark. on Ev., 1702.

⁵ Post page.

⁶ 4 Den., 9.

⁷ 2 R. S., 697, § 2.

⁸ 4 Blac. Com. ch. 25 § 6.

⁹ Peo. v. Robinson, 1 Park. 649; 7 C. & P. 145; 2 Id. 235; 1 Beck. 627; 5 Mason, 28; Lewis' Cr. L. 394-405.

crime, and so long as the offender is capable of conceiving a design, he will be presumed in the absence of contrary proof, to have intended the natural consequences of his own acts.¹

Thus, the voluntary intoxication of one who without provocation commits a homicide, although amounting to frenzy, does not exempt him from the same construction of his conduct, and the same legal inferences upon the question of intent, as affecting the grade of his crime, which are applicable to a person entirely sober.²

But evidence of intoxication is, however, always admissible. Where the crime was committed after provocation, it may be considered in determining whether it was done in the heat of passion; and in other cases whether threatening words were uttered by the culprit, with deliberate purpose, or otherwise, and generally, to explain his conduct.³

The question is well settled, that insanity occasioned by previous habits of intemperance, and not directly resulting from the immediate effects of intoxicating liquors, is entitled to the same consideration as insanity from any other cause; thus, where a person is insane at the time he commits a murder, he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors; although, as we have previously seen, it is otherwise if he be at the time intoxicated, and his insanity be directly caused by the immediate influence of such liquors.⁴

So, also, where the frenzy is induced by a violent passion, unless settled down into a state of total derangement, it will not excuse the commission of an offence.⁵

7 That the prisoner was intoxicated, is no defence to an indictment for perjury.⁶ {

¹ *Kenny v. People*, 31 N. Y. 330.

² *Peo. v. Rogers*, 18 N. Y. (4 Smith,) 9.

³ *Idem*; 1 Russ. on Cr. 8; Add. R. 257; Ros. Cr. E. 784; *Peo. v. Eastwood*, 14 N. Y. (4 Kern.) 562; *Peo. v. Hammil*, 2 Park. 223.

⁴ *U. S. v. Drew*, 5 Mason (Circuit Court), 28; *Peo. v. Rogers*, 18 N. Y. 9; *Peo. v. Robinson*, 2 Park. 235.

⁵ *Pienovi's Case*, 3 City H. Rec. 123.

⁶ *Peo. v. Wildey*, 2 Park. 19.

SECTION III.

EXEMPTION FROM PUNISHMENT FOR ACTS DONE IN SUBJECTION TO
THE POWER OF OTHERS.

It is laid down from the earliest writers that persons are properly excused from those acts which are not done of their own free will, but in subjection to the power of others;¹ for where there is compulsion and inevitable necessity, they are a constraint upon the will whereby a man is urged to do that which his judgment disapproves, and which it is to be presumed his will (if left to itself) would reject.² The principal cases, under which this class of exemptions from punishment arise, may be arranged under the following heads:

- 1 *Duress per minas, or by threats and menaces.*
2. *The obligation of civil subjection which arises from either public or private relations.*

1 The species of compulsion or necessity which arises in cases of threats and menaces, are those which induce a fear of death or other bodily harm, and the fear which compels a man to do an unwarrantable action ought to be just and well founded.³

The general rule may be laid down, that the person committing a crime will not be answerable if he was not a free agent, and was subject to actual force at the time the act was done. Thus, if A, by force, take the arm of B, in which is a weapon, and thereunto kill C, A is guilty of murder but not B; but if it be only a moral force put upon B, as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C, it is no legal excuse.⁴

The law regards life and member, and not only protects every man in the enjoyment of them, but furnishes him with everything necessary for their support;⁵ and it is said that *duress per menas* is either fear for loss of life, or else fear for mayhem, or loss of limb.⁶ This fear of battery or being beaten, though never so

¹ Russ on Cr., 18; 1 Hale, 43; 4 Black. Com., 27.

² 4 Black. Com., 28.

³ 4 Black. Com., 30.

⁴ 1 Russ. on Cr., 18; 1 Hale, 433; 1 East., P. O. C., 5, § 12.

⁵ 1 Black. Com., 131.

⁶ Id.

well grounded, is no duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases should the threat be performed; a man may have satisfaction by recovering equivalent damages, but no suitable atonement can be made for life or limb.¹

2. The obligations of civil subjection to the power of others, is as before stated, either public or private.

(a) It is public where the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest, as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality.² Whatever questions may arise in a man's conscience as to whether a man in such case is not bound to obey Divine rather than human law, obedience to such laws while in being, is a sufficient extenuation of civil guilt before the municipal tribunal.³

(b) The obligation of civil subjection to the power of others, arises in private relations in the case of a *feme covert*, for a married woman is so much favored in respect of that power and authority which her husband has over her, that she shall not suffer punishment for crime committed by her in certain cases by the coercion of her husband, or even in his company and presence, which the law construes a coercion.⁴

But this is only the presumption of law, so that if upon the evidence it clearly appear that the wife was not driven to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband. And if she be in any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact, in the same manner as if she had been sole.⁵

And the rule has therefore been laid down, that if a felony be shown to have been committed by the wife in the presence of the husband, the *prima facie* presumption is that it was done by his coercion, but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity

¹ 1 Black. Com., 131; Co. Litt., 133.

² 4 Blac. Com. 28.

³ Idem; 1 Russ. on Cr., 18.

⁴ 1 Russ. on Cr., 18; 1 Hale, 45; 1 Hawk. P. C., ch. 1, § 9; 4 Blac. Com., 28; Kel., 31.

⁵ 1 Russ. on Cr., 18; 1 Hale, 516; 2 Hawk. P. C., ch. 29, § 24.

in the husband to coerce. Thus, where a husband and wife were tried together, and it appeared that the husband though present was a cripple, and bed-ridden in the room, it was held that the circumstances under which the husband was, repelled the presumption of coercion.¹

The coercion of the husband is not to be presumed when he is not present at the commission of the crime, though it were committed at his procurement,² and the mere command of the husband will not excuse her if he be not present, even though he appear at the very moment after the commission of the offence, for no subsequent act of his can excuse her, and the coercion must be at the time of the act done.³

A married woman, however, may be punished with her husband, for keeping a bawdy house, for this is an offence as to the government of the house in which the wife has a principal share, and also, such an offence as may generally be presumed to be managed by the intrigues of the sex.⁴ So also, of keeping a gaming house.⁵ These last two cases arise, one upon a motion in arrest of judgment, and the other upon demurrer, and the responsibility is presumed in law to rest upon her voluntary participation in these particular cases. Where the wife offends alone without the company or coercion of her husband, she is as much responsible for her offence as if she were a *feme sole*, and among others, *feme covert*s have been indicted for riots, violation of excise laws, recusancy, being a common scold, assault and battery, forestalling, forcible entry, trespass and slander, and the rule held good, that she was responsible for the offences, they not having been committed in the presence or by the coercion of the husband.⁶

In cases of treason, murder and robbery, however, it is no ground of exemption from punishment for the wife, that the

¹ 1 Russ. on Cr. 22; Reg. v. Cruse, 2 M. C. C. R., 53.

² 1 Russ. on Cr., 21; R. v. Morris, Russ. & Ry. 270; 1 Hale Pr., 45; 1 Leach, 447.

³ 1 Russ. on Cr., 19; 1 Arch on Cr. Pl., 6; Russ. & Ry. C. C., 270.

⁴ 1 Russ. on Cr., 20; 1 Hawk., P. C., ch. 1, § 12; 10 Mod., 63; Salk., 384.

⁵ Rex v. Dixon, 10 Mod., 335; 1 Burr, 600.

⁶ 1 Russ on Cr., 21; 4 Blac. Com., 29; Str., 1120; Hob., 96; 11 Co., 63; 1 Sid., 410; Sov., 25; 6 Mod., 213, 239; Salk, 384; 2 Kel., 634; Bac. Abr., Baron and Feme, G note; 1 Hale, 21; Co. Lit., 357; 1 Hawk. ch. 64, § 35; Id.; c. 1, 13, n. 11; 1 Bac. Abr., 294.

offence was committed in company with or by coercion of her husband; for these crimes being *mala in se*, no plea of coverture will excuse her.¹

(c) The private obligation of son or servant is not a sufficient subjection to maintain an excuse for the commission of any crime by the command or coercion of the parent or master.²

Thus, it is no defence to one of two persons indicted for selling liquor in violation of law, that he did the acts complained of as a clerk of the other defendant and by his direction, there being no allegation that the illegal acts were done by compulsion.³

But where a wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct; so held where a husband and wife were jointly indicted for neglecting to provide an apprentice with proper food and nourishment.⁴

(d) Another class of persons who act in subjection to the power of others, are innocent agents; for if a man procure an offence to be committed by an innocent agent, the man alone is guilty, the agent not.⁵

So where a man was indicted as principal in stealing coal from a mine, and it appeared that he was lessee of one mine, and from thence caused his workmen to take the coal of other persons under the adjoining land, it was observed that although the prisoner did not by his own hand pick or remove the coal, yet if a man do by means of an innocent agent an act which amounts to felony, the employer, and not the agent, is the person accountable for the act.⁶

¹ 4 Blac. Com., 29; 1 Russ on Cr., 19; 1 Hawk., P. C., c. 1, § 11; 1 Hale, 45, 47, 48, 516; Kel., 31; R. v. Manning, 2 C. & K., 903; 8 C. & P., 545; 2 Mod., C. C., 54; 1 Arch. Cr. Pl., 6.

² 4 Blac. Com., 29; 1 Hawk., P. C., 3; 1 Hale, 44, 516.

³ French v. Peo., 3 Park., 114.

⁴ 1 Russ. on Cr. 20; Rex v. Squire, 1799, M. S.

⁵ 1 Arch. Cr. Pl., 11.

⁶ R. v. Blasdale, 2 C. & K., 765; Vide 1 Car. & K., 295; 2 Id., 202; 2 Hawk., ch. 29, § 11; 10 Met., 259; 1 Gray, 553; 1 Hale, 617.

SECTION IV.

EXEMPTION FROM PUNISHMENT ARISING FROM IGNORANCE OR MISTAKE OF FACT.

The plea or excuse of ignorance, will apply only to ignorance or mistake of fact, and not to any error in point of law. for ignorance of the law of the land is not allowed to excuse any one that is of the age of discretion and *compos mentis*, from its penalties when broken, on the ground that every such person is bound to know the law, and presumed to have that knowledge.¹

And it is no defence for a foreigner that he did not know he was doing wrong, the act not being an offence in his own country.²

The rule in relation to persons claiming exemption from punishment for offences committed from chance or mistake, has been stated to be that where a man in the execution of one act, by misfortune or chance, and not designedly, does another act, for which if he had willfully committed it he would be liable to be punished; in that case if the act he was doing were lawful or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or chance; but if *malum in se*, it is otherwise.³ Thus, a person from ignorance or mistake, not of law but of fact, may commit an offence and still be unpunishable for it, as if a man thinking to kill a house-breaker in his house, kill one of his own family, he is not punishable for it.⁴ But if the act he intended doing were unlawful, he may, in general, be punishable for the act he committed through ignorance or mistake, in the same way as if he willfully did it; as for instance, if a man intending to kill A kill B, he will be equally guilty as if he had killed A.⁵

But the rules above laid down where the party claims exemption from punishment, must be understood of cases where the innocent act is done with reasonable skill and care, for if the unintended offence arise from ignorance where skill was required, or from negligence, where great care and caution was required,

¹ 1 Russ. on Cr., 25; 4 Black. Com., 27; 1 Hale, 42; Plowd., 343.

² 1 Russ. on Cr., 25; 7 C. & P., 456.

³ 1 Arch. Cr. Pl., 9; 1 Hale, 39; Foxt. 259.

⁴ Oro. Car., 538; 4 Black. Com., 27; 1 Hale's P. O., 42.

⁵ 1 Arch. Cr. Pl., 10.

the party will, in most cases, be liable to punishment for the act done which was not intended.¹

Thus, if one lays poison to kill rats, and another takes it and dies, this may be misadventure; but if it were laid in such a manner and place, as to be easily mistaken for proper food, it might, in some cases, amount to manslaughter.

SECTION V.

AMBASSADORS, PUBLIC MINISTERS AND CONSULS.

At the common law ambassadors and their servants were not punishable for offences which are *mala prohibita* merely and not *mala in se*, but for such offences as murder or rape of great enormity, against nature and the fundamental laws of society, they were punishable the same as any other alien.²

The constitution of the United States declares that the judicial power of the Supreme Court is extended to all cases affecting ambassadors and other public ministers and consuls, and such jurisdiction being declared original, the federal jurisdiction is understood to be exclusive of the State courts.³

¹ 1 Arch. Cr. Pl., 9.

² 1 Arch. Cr. Pl., 8; 1 Hale, 96, 99; Fost., 187, 188.

³ U. S. Const., art. 3, § 2. Vide Wheat. Int. L., 264, § 6; Vattel, 470, § 91, *et seq.*; 1 Bish. Cr. L., 585, Act Cong., 1790, ch. 9, § 25.

CHAPTER II.

OF THE DEGREES OF GUILT.

GENERAL REMARKS.

Section I.—PRINCIPALS IN THE FIRST DEGREE.

II.—PRINCIPALS IN THE SECOND DEGREE.

III.—ACCESSORIES BEFORE THE FACT.

IV.—ACCESSORIES AFTER THE FACT.

V.—PERSONS ATTEMPTING TO COMMIT OFFENCES AND SOLICITING OTHERS TO ATTEMPT THE COMMISSION OF THEM IN CASES WHERE THE OFFENCE IS NOT PERPETRATED.

IN considering the participation which an offender may have in the crime committed, we find that he will be guilty either in the character of principal or accessory ; for he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon according to the share which he takes in the crime.¹ And as principal, the offender is either principal in the first degree or the second ; and as accessory, he is either an accessory before the fact or an accessory after it.

The distinction between principals and accessories, only obtains in felonies, for in misdemeanors all are principals.²

At the common law there were also no accessories in treason,³ but it seems doubtful whether any such distinction is known to us.⁴

At the common law the rule also was that all were principals, and that whatever would make a man an accessory before the fact in felonies, would make him a principal in forgery, but this must be understood of forgery at common law, and where it was considered only as a misdemeanor.⁵

In those offences which, in judgment of law, are sudden and

¹ 1 Arch. Cr. Pr., 12; 3 Inst. 21-438; 1 Hale, 233; Fost., 341; 12 Co., 812; Co. Lit., 57; Hawk., B. 2, ch., 29, § 1; 13 Ire., 114; Dalt. 9, ch. 161; 7 Serg. & Raw., 479; 3 Mass., 254; 6 Hill., 144.

² 1 Arch. Cr. Pr., 12; Peo. v. Erwin, 4 Den., 129.

³ 3 Inst., 21-438; 1 Hale, 233-613; Fost., 341; 2 Co. Lit., 57; 4 Blac. Com., 35.

⁴ U. S. v. Burr, 4 Cranch, 472-501; Davis' Cr. L., 38.

⁵ 1 Russ. on Cr., 33; Moor, 666; 1 Seld., 312; 2 Hawk., ch. 29, § 2; 2 East. P. C., 973; 2 Leach, 1096.

unpremeditated, as manslaughter and the like, there cannot be any accessories before the fact.¹

Neither are there any accessories in petit larceny on account of the smallness of the felony; all are principals; thus, one who sends another to commit petit larceny may be convicted as a principal, although the offence was committed in his absence.²

In misdemeanors there are no accessories, but all the guilty actors, whether present or absent at the commission of the offence, are principals, and should be indicted as such.³ An accessory cannot be tried before the trial and conviction of the principal offender.⁴

SECTION I.

PRINCIPALS IN THE FIRST DEGREE.

The general definition of a principal in the first degree is one who is the actor or actual perpetrator of the crime.⁵

At the common law the rule was, that principals in the second degree might be prosecuted as principals in the first, where the punishment was the same;⁶ and, by our statute, principals in the second degree, in the commission of felonies, are subjected to the same punishment as those in the first degree.⁷ This was also the rule in cases of misdemeanors at the common law.⁸ Hence, much of the learning laid down in the books, distinguishing between principals in the first or second degree, is practically of little or no importance, except so far as the same may be necessary to distinguish between principals and accessories.

(a) The act need not have been done with the offender's own

¹ 1 Russ. on Cr., 33; 4 Blac. Com., 36; 1 Hale, 615; 2 Hawk., P. C., ch. 29, § 24.

² Ward v. Peo., 6 Hill, 144; affg. 3 Id. 395.

³ Peo. v. Erwin, 4 Den., 129; Vide, 2 Hill, 558.

⁴ Baron v. Peo., 1 Park., 246.

⁵ 4 Blac. Com., 33; 1 Hale, P. C., 233, 615.

⁶ 2 Hawk., P. C., ch. 23, § 26; ch. 25, § 64; 9 Co. Rep., 67, ch. 3 T. R., 105; Fost., 342.

⁷ 2 B. S., 698, § 6.

⁸ 1 Arch. Cr. Pl., 13.

hands, for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree.¹ And this is so even where the offence is committed within this State, by means of an innocent agent, and the employer did no act in this State, and was, at the time the offence was committed, in another State.²

Thus, if a child under the age of discretion or any other instrument, excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or other crime, the inciter, though absent when the act was committed, is *ex necessitate* liable for the act of his agent, and a principal in the first degree.³ And this is on the common law principle, *qui facit per alium facit per se*, which, according to the late Chief Justice HOSMER, of Connecticut, is of universal application both in criminal and civil cases.⁴

(b) It is not necessary that the perpetrator should be actually present when the offence is consummated. This we have already seen to be the rule in some instances, but it is equally applicable in others. Thus, if a murder is committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail to prove fatal, as by laying a trap or pitfall for another, whereby he is killed; turning out a wild beast to do mischief, exciting a madman or child to commit murder, laying poison purposely for another who takes it, so that death thereupon ensues, or sending forged paper through the mail to a broker, to be presented and collected; the party offending is a principal in the first degree.⁵

¹ *R. v. Giles*, 1 Mod. C. C., 166; 2 Mood, 120; 9 C. & P., 356; 1 Comstock, 173; 3 Denio, 190.

² *Adams v. Peo.*, 1 Com., 173.

³ *Fost.*, 349; *Hawk.*, ch. 31-37; *R. v. Palmer*, 1 W. R., 96; 2 Leach, 978.

⁴ 1 Arch. Cr. Pl., § 12, notes.

⁵ *Vaux's case*, 4 Co., 44, b.; *Fost.*, 349; 4 C. & P., 269; 4 Cranch, 470; 1 Hale, 514; 4 Blac. Com., 35; *Hawk. B.*, 2, ch. 29, § 11; *Chit. Cr. L.*, vol. 1, 257; 21 Wend., 509; 8 Am. Jur., 69.

SECTION II.

PRINCIPALS IN THE SECOND DEGREE.

Principals in the second degree, are those who are present aiding and abetting at the commission of the crime. They are generally termed aiders and abettors, and sometimes accomplices, but the latter appellation will not serve as a term of definition, as it includes all the *particeps criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact.¹

The distinction between principals in the first and principals in the second degree, appears to have been unknown to the ancient writers upon the criminal law, who considered the persons present aiding and abetting, in no other light than as accessories at the fact, but as such accessories they were not liable to be brought to trial till the principal offender should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed, and with a view to obviate this mischief, the judges by degrees adopted a different rule, and at length it became settled law, that all those who are present aiding and abetting when a felony is committed, are principals in the second degree.² For a felony may be committed by a person constructively present, though not actually present; but to be constructively present he must be of the party, and do some act in execution of the common design, or be near enough to the scene of operation to assist in carrying it out, or to aid those who are immediately engaged in it to escape, should necessity require.³

So to constitute principals in the second degree, three requisites must combine; *they must be present, aiding and assisting, and with a felonious intention to the crime.*⁴

(a) They must be present, and this presence may be either actual or constructive.

¹ 1 Russ. on Cr., 26; Fost., 341.

² 1 Russ. on Cr. 26; 1 Leach, 66; Fost. 428; Russ. & Ry., 314-363; 1 Chit. Cr. L., 256; Matt. Dig., 4; 1 Arch. Cr. Pl., 4.

³ Wixson v. People, 5 Park., 119.

⁴ 1 Arch. Cr. Pl., § 12, note; 1 Hale, 438-439-446; Fost., 349-350; 1 Chit. Cr. L., 256; R. v. Soare et R. v. Davis, Russ. & R., 99-29-113; Leach, 360.

It is not necessary that the presence should be a strict actual immediate presence, such a presence as would make the party an eye or ear witness of what passes, but it may be a constructive presence, such as being near and ready to render assistance if necessary, or the occasion should arise ; that is such contiguity as will enable the party to render assistance in the main design.

With regard to what will constitute such a presence as to render a man a principal in the second degree, it is said by Mr Justice FOSTER, that if several persons set out together, or in several parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the act, others to watch at proper distances to prevent a surprise, or to favor, if need be, the escape of those who are immediately engaged, they are all, provided the act be committed, in the eye of the law present at it.¹

Thus, where A waits under a window while B steals articles in the house, which he throws through the window to A, the latter is a principal in the offence.²

The party must also be so near as to be able to assist in the crime. Thus going towards the place where the felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal, if he was at such a distance at the time as not to be able to assist in taking it ; for where the prisoner and A went to steal two horses and left the prisoner half a mile from the place where the horses were, and brought the horses to him, and both rode away with them, upon a case reserved, the judges thought the prisoner an accessory only, and not a principal, because he was not present at the original taking.³

It is not essential that the party should be present during the whole of the commission of the offence. Thus, if several execute distinct parts of a forged instrument, in pursuance of a common design, they are all principals, though they are not together.

¹ Ros. Cr. Ev., 6th ed., 168 ; 1 Russ. on Cr., 26.

² Foster, 350 ; Ros. Cr. Ev., 6th ed., 168 ; 1 Russ. on Cr., 26.

³ Rex v. Owen, East. T., 1825 ; 1 Moody, 96. Vide 9 Pick., 496-516 ; Cranch., 492 ; 1 Russ. on Cr., 26 ; Ros. Cr. Ev., 168 ; Fost., 347 ; 1 Devy, 207

⁴ 1 Russ. on Cr. 28 ; Rex v. Kelley, Russ. & Ry., 421. Vide 6 Pick., 496.

when it is completed, and this is so even where each does not know by whom the other parts are executed.¹

So also, where two persons with their umbrella screened a third while he was breaking into a dwelling house in the day time, and then went away and were not seen near the place while the third party was committing a larceny in the house.²

(b) Mere presence is not enough to constitute a party a principal in the second degree; but there must be some participation. It must be shown, either that the party did the act (when he would be principal in the first degree), or that he was present when it was done, and did some act at the time in aid, which shows that he was present aiding and assisting, or that he was of the same party in the same pursuit, and under the same expectation of mutual support and defence with those who committed the crime;³ for it is necessary that the party should say or do something, showing his consent to the felonious purpose, and contributing to its execution; or else that he should come with others with intent to do the mischief, though only one does it.⁴ So, therefore, if two persons are fighting and a third comes by and looks on but assists neither, he is not guilty of homicide in any degree in case one of them be killed;⁵ and in all cases where there is no common purpose, a person who is merely present at a murder, but neither takes any part in it nor endeavors to prevent it, nor apprehends the murderer, nor raises hue and cry after him, although such behavior is highly reprehensible, it will not, of itself, render him a principal.⁶

But this aid and participation need not amount to more than watching to prevent a surprise to his companions, or remaining at a convenient distance to favor their escape, or being in a situation to render assistance if necessary, the knowledge of which would be calculated to inspire confidence in his comrades.⁷

¹ *Rex v. Bingley*, R. & R., 446; *R. v. Kirkwood*, R. & M., 304; *R. v. Dade*, Id., 307.

² *R. v. Jordan*, 7 C. & P., 432.

³ 1 Russ. on Cr., 27; *R. v. Borthwick*, Dougl., 207; 1 Hale, 439; Foster, 350; 9 Ire., 440.

⁴ 3 Wash. C. C., 223; 1 Wis. Rep., 159; 1 Hale, 439, 440; Foster, 350; 9 Iredell, 440.

⁵ 1 Hale, 439.

⁶ Foster, 350.

⁷ *Com. v. Knapp*, 9 Peck, 496; 5 Porter, 32; Russ. & Ry., 305.

(c) There should be a felonious intention to the felony, for a mere participation in the act without a felonious participation in the design, will not be sufficient.¹

The purpose must be unlawful, for if the original intention was lawful and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case; but the other persons who are present and do not actually aid and abet, are not guilty as principals in the second degree, for they assembled for another purpose which was lawful, and consequently the guilt of the person actually killing cannot, by any fiction of law, be carried against them beyond their original intention.²

So, also, if a master assault another with malice prepense, and the servant ignorant of his master's felonious design, take part with him and kill the other, it is manslaughter in the servant, and murder in the master.³

SECTION III.

OF ACCESSORIES BEFORE THE FACT.

An accessory is he who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein either before or after the fact committed,⁴ and absence is indispensably necessary to constitute one an accessory, for if he be actually or constructively present when the felony is committed, he is an aider and abettor, and not an accessory before the fact.⁵

An accessory before the fact, is he who being absent at the time of the offence committed, yet doth procure, counsel, command or abet another to commit a felony. And it seems that those who by hire, command, counsel or conspiracy, and those who by showing an express liking, approbation or assent to another's felonious

¹ 1 East. P. C., 257; R. v. Plumer, Kel., 109.

² 1 Arch. Cr. Pl., 12, notes; Fost., 354, 355; 2 Hawk. P. C., ch. 29, § 9.

³ 1 Hale, 466.

⁴ 4 Blac. Com., 35.

⁵ 1 Hale's P. C., 615; 1 Leach, 515; 1 East. P. C., 352; 4 Blac. Com., 36-37; 15 Geo. Rep., 346.

design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact.¹

It makes no difference if there be some variance in time, place, manner or other circumstance, between the advice or command and the execution of the felony, if it be afterwards committed the same in substance with that counselled or commanded ; as where a person advises a man to kill another in the day, and he kills him in the night ; or to kill him in the fields, and he kills him in the town ; or to poison him, and he stabs or shoots him ; in all these cases he is as much an accessory as if his advice or command had been strictly pursued.²

But if the execution of the felony vary in substance from the advice or command, as if a man advise another to kill A, and he kills B ; or to burn the house of A, and he burns the house of B ; or to steal an ox, and he steals a horse ; or to steal a particular horse, and he steals another ; or to commit a felony of one kind, and he commits another of quite a different nature ; in these and the like cases, the party who advised and commanded, &c., cannot be deemed an accessory before the fact to the felony actually committed.³

In cases where the principal goes beyond the terms of the solicitation, yet, if in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony.⁴

As if A advise B to rob C, and in robbing him B kills him, either upon resistance made or to conceal the fact, or if A solicit B to burn the house of C, and B does it accordingly, and the flames taking hold of the house of D, that likewise is burnt. In these cases A is accessory to B both in the murder of C and in the burning of the house of D, for the events, though possibly falling out beyond his original intention, were in the ordinary

¹ 1 Russ. on Cr., 30 ; 1 Hale, 615 ; Hawk. P. C., ch. 29, § 16 ; 4 Blac. Com., 37 ; 1 Leach, 515. Vide Car. & M., 215.

² 1 Arch. Cr. Pl., 14 ; 2 Hawk., ch. 29, § 20.

³ 1 Arch. Cr. Pl., 15 ; 2 Hawk., ch. 29, § 21 ; Fost., 369 ; 1 Hale, 617 ; 1 Russ. on Cr., 35.

⁴ 1 Russ. on Cr., 35.

course of things the probable consequences of what B did under the influence and at the instigation of A.¹

Difficult questions have sometimes arisen where the principal, by mistake, commits a different crime from that to which he was solicited by the accessory. Mr. Justice FOSTER proposed the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn: "Did the principal commit the felony he stands charged with, under the influence of the flagitious advice, and was the event in the ordinary course of things a probable consequence of that felony, or did he, following the suggestions of his own wicked heart, willfully and knowingly commit a felony of another kind, or upon a different subject.² But where the principal willfully commits a different crime from that which he is advised or commanded to commit, the party counseling him will not, as above stated, be guilty as an accessory.

It is not necessary, in order to constitute the offence of accessory, that there should be any direct communication between him and the principal; the procurement may be through the intervention of an agent.³ And if managed through an agent it is not necessary that the principal should be named by the accessory, for if the latter desire the agent to procure some person to commit the offence without naming him, and the agent accordingly procure a person, wholly unknown to the accessory, to commit it, it will be sufficient to constitute the offence of accessory before the fact.⁴

Thus, if A bid his servant to hire somebody, no matter whom, to murder B, and furnish him with money for that purpose, and the servant procure C, a person whom A never saw or heard of, to do it; A who is manifestly the first mover and contriver of the murder, is an accessory before the fact.⁵

Mr. STARKIE says: Upon the subject of the degree of incitement and the force of persuasion used, no rule is laid down; that it was sufficient to effectuate the evil purpose, was proved by the result; on principle it seems that any degree of direct incitement, with the actual intent to procure the consummation of the

¹ Fost., 370; Plow, 475; 1 Russ. on Cr., 35.

² 1 Russ. on Cr., 36; Fost., 372.

³ R. v. Cooper, 5 Car. & P., 534.

⁴ 1 Arch. Cr. Pl., 15; 5 C. & P., 534.

⁵ Fost., 125, 121.

illegal object, is sufficient to constitute the guilt of the accessory, and, therefore, that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed, although the incitement had never taken place.¹

If an accessory repents, and, before the execution of the offence, countermands the principal, yet the principal proceeds in the execution thereof, the procurer is not an accessory, for his consent does not continue.²

He who barely conceals a felony which he knows to be intended, is not an accessory before the fact;³ neither will the use of words that amount to a bare permission, make an accessory. As if A says, that he will kill J. S., and B says, "you may do your pleasure, for me."⁴

It has been held in this State that an accessory before the fact to a murder is guilty of murder.⁵

Although an accessory before the fact, upon conviction, is liable to be punished as the principal in the first degree, yet the distinction between principals and accessories, is not one of form merely, but is material, and founded on principle, and relates to the regularity of criminal proceedings; and, therefore, one indicted as principal, cannot be convicted on testimony showing him to have been only accessory before the fact.⁶

SECTION IV.

OF ACCESSORIES AFTER THE FACT.

An accessory after the fact says Lord HALE, is where a person knowing the felony to be committed by another, receives, relieves, comforts or assists the felon,⁷ whether he be a principal or an accessory before the fact.⁸

By our Revised Statutes, it is provided, that every person who

¹ 2 Stark. Ev., 8, 2d ed.

² 1 Hale, 617; 1 Russ. on Cr., 35.

³ 1 Hale 616; 2 Hawk. P. C., ch. 29, § 23.

⁴ 1 Russ. on Cr. 31; Hawk. P. C., ch. 29, § 16.

⁵ *Peo. v. Mosher*, 4 Wend. 229.

⁶ *Peo. v. Katz*, 23 How., 93.

⁷ 1 Hale's P. C., 618; 2 Bla. Com., 38.

⁸ 2 Hawk., ch. 29, § 1; 3 P. Wms., 475.

shall be convicted of having concealed any offender after the commission of any felony, or having given such offender any other aid, knowing that he has committed a felony, with intent, and in order that he may avoid or escape from arrest or trial, conviction or punishment, and no others, shall be deemed an accessory after the fact.¹

In order, therefore, to constitute one an accessory after the fact, these three things are requisite. The felony must be completed—he must know that the felon is guilty, and he must conceal or give the offender other aid, with the intent that may avoid or escape arrest, trial, conviction or punishment.

(a) The felony must be complete at the time of the assistance given, as if one wounded another mortally, and after the wound given, but before death ensued, a person assisted or removed the delinquent, this did not at common law make him an accessory to the homicide, for till death ensued, there was no felony committed.²

(b) He must also know that the felon is guilty, for a man cannot be rendered guilty as an accessory after the fact, without having notice, either express or implied, of the principal having committed a felony.³

(c) With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down that generally any assistance whatever given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is sufficient for this purpose; as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where one harbors and conceals in his house a felon under pursuit, in consequence of which his pursuers cannot find him; and much more where the party harbors a felon, and the pursuers dare not take him.⁴

So also, a man who employs another person to harbor the principle, may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal.⁵ And in

¹ 2 R. S., 699, § 7.

² 1 Ros. Cr. Ev., 173; 2 Hawk. P. C., ch. 29, § 35; 4 Bla. Com., 38.

³ 2 Hawk. P. C., ch. 29, § 83; 2 R. S., 699, § 7.

⁴ 1 Ros. Cr. Ev. 173; 2 Hawk. P. C., ch. 29, § 26; R. v. Lee, 6 C. & P., 536.

⁵ R. v. Jarvis, 2 Moo. & R., 40.

the same manner conveying instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, makes the party an accessory.¹

But in order to support a charge of receiving, harboring, comforting, assisting and maintaining a felon, there must be some act proved to have been done to assist the felon personally ; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen,² nor will a mere omission, as not arresting the felon, make the party an accessory after the fact.³

The books agree that a man may be an accessory after the fact, by receiving one who was an accessory before the fact, as well as by receiving a principal,⁴ and it has been held that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harboring or concealing the thief, or assisting in his escape.⁵

Our statute is silent upon the question of the exemption of a *feme covert* from punishment as an accessory after the fact, in cases where the principal offender is her husband, but it is considered that the common law rule upon that subject yet remains in force, for the common law had such a regard to the duty, love and tenderness which a wife owes to her husband, that it did not make her an accessory to felony by any receipt whatever which she might give him, considering that she ought not to discover her husband,⁶ but this exception did not extend any further, for a husband may be indicted as an accessory after the fact to his wife, a brother to a brother, a master to a servant, or a servant to a master.⁷

¹ 4 Blac. Com., 38.

² R. v. Chapple, 9 C. & P., 355.

³ 1 Hale's P. C., 619.

⁴ 1 Russ. on Cr. 37 : R. v. Jarvis, 2 M. & Rob., 40.

⁵ 1 Russ. on Cr., 37 ; Fost., 123.

⁶ 1 Russ. on Cr., 38 ; 2 Hawk., ch. 29, § 34 ; 1 Hale, 621.

⁷ 1 Arch. Cr. Pl., 18 ; 2 Hawk., ch. 29, § 34 ; 1 Hale, 621.

SECTION V.

OF PERSONS ATTEMPTING TO COMMIT OFFENCES AND SOLICITING OTHERS TO ATTEMPT THE COMMISSION OF THEM, IN CASES WHERE THE OFFENCE IS NOT PERPETRATED.

We have, in treating of accessories before the fact, considered those cases where a person counsels or incites another to commit a felony, which the other afterwards commits, and in treating of principals the cases considered have been those where the offence was also actually committed; but there are still another class of cases where the party incited does not afterwards commit the offence, or where the party attempts to commit a particular offence, but does not succeed in so doing.

A mere solicitation to commit felony is an offence, whether it be actually committed or not.¹ Our statutes contain several provisions in relation to persons advising others to commit offences, which will be noticed hereafter; and there is also a provision providing for the punishment of persons who shall attempt to commit an offence prohibited by law, and in such attempt shall do anything towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same.²

And, by the laws of 1862,³ persons found armed with dangerous or offensive weapons or instruments, with intent to commit felony, or found by night having in their possession any pick-lock, crow, key, bit, jack, jimmy, nippers, pick, bettey, or other implements of burglary with like intent, or being found in any dwelling house, building or place, where personal property shall be, with intent to commit any larceny or felony therein, under such circumstances as shall not amount to an attempt to commit felony, are to be deemed guilty of a misdemeanor, and if such offence be committed after a previous conviction, either for felony, petit larceny or such misdemeanor as aforesaid, the party offending is guilty of felony.⁴

¹ *Peo. v. Bush*, 4 Hill, 135; *R. v. Higgins*, 2 East., 5; 1 Arch. Cr. Pl., 20.

² 2 R. S., 698, § 3.

³ Ch. 374, p. 627.

⁴ *Id.*

CHAPTER III.

OF THE SEVERAL JUDICIAL OFFICERS AND COURTS POSSESSING CRIMINAL JURISDICTION IN THE STATE OF NEW YORK.

GENERAL REMARKS.

Section I.—OF COURTS OF SPECIAL SESSIONS.

- II.—SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.
- III.—SPECIAL SESSIONS IN THE CITY OF BROOKLYN.
- IV.—SPECIAL SESSIONS IN THE CITY OF ALBANY.
- V.—SPECIAL SESSIONS IN UTICA.
- VI.—SPECIAL SESSIONS IN OSWEGO.
- VII.—SPECIAL SESSIONS IN THE COUNTY OF MONROE.
- VIII.—SPECIAL SESSIONS IN ELMIRA.
- IX.—SPECIAL SESSIONS IN HUDSON.
- X.—SPECIAL SESSIONS IN TROY AND THE COUNTY OF RENSSELAER.
- XI.—SPECIAL SESSIONS IN THE VILLAGE OF LANSINGBURGH.
- XII.—SPECIAL SESSIONS IN WILLIAMSBURGH.
- XIII.—SPECIAL SESSIONS IN Poughkeepsie.
- XIV.—SPECIAL SESSIONS IN THE TOWNS OF WATERTOWN AND WATERVLIET.
- XV.—SPECIAL SESSIONS IN ROCHESTER AND THE VILLAGE OF SARATOGA SPRINGS.
- XVI.—COURTS OF SESSIONS.
- XVII.—CITY COURT OF BROOKLYN.
- XVIII.—SUPERIOR COURT OF THE CITY OF BUFFALO.
- XIX.—RECORDER'S COURT OF THE CITY OF OSWEGO.
- XX.—RECORDER'S COURT OF THE CITY OF UTICA.
- XXI.—COURT OF GENERAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.
- XXII.—COURTS OF OYER AND TERMINER.
- XXIII.—THE SUPREME COURT.
- XXIV.—THE COURT OF APPEALS.

It is not intended in this chapter to review all the provisions of the statute applicable to courts of limited or special jurisdiction. In many of the cities and villages of the State there are recorder's courts and courts of special sessions, having a local jurisdiction only, and the particular provisions of the statute relative to the duties of the district attorney, and of the clerks, sheriff, and other officers of these courts, together with the manner of summoning and empanneling juries, taking and continuing recognizances and other matters, depending upon statutory enactment made applicable to these courts alone, and in many instances differing in each court, can best be observed by consulting the several acts of the legislature organizing these courts, and conferring their authority and power upon them. It is designed here to take only a cursory glance of the several judicial officers and courts in the State possessing criminal jurisdiction.

Justices of the Supreme Court, judges of the Superior Court of law, of the city and county of New York, judges of county courts, mayors, recorders, and aldermen of cities; the justices of the justices' court, and police justices in the city of New York, and justices of the peace and police justices appointed for any city, or elected in any town, have authority to issue process upon complaint for the arrest and detention of offenders, to examine into the circumstances of the case, to commit them for trial or let them to bail.¹

These various duties and powers of the above mentioned officers, in this respect, will be treated of fully hereafter.² The same officers have also authority to cause to be kept all laws for the preservation of the public peace, and in the execution of that power to require persons to give security to keep the peace.³ They have also power to issue search warrants for property that has been stolen or embezzled, in the cases provided by statute.⁴

Justices of the peace have also certain summary powers and authority given to them by statute, in relation to disorderly persons and other minor offences, and, in some instances, the authority given by statute to summarily convict and punish by fine or imprisonment for minor offences, without the intervention of a jury, is extended to the mayor, recorder, and aldermen of cities. The particular instances in which this power is to be exercised, and the method of proceeding thereon, will be spoken of in a subsequent chapter.⁵

SECTION I.

OF COURTS OF SPECIAL SESSIONS.

In some of the cities and villages of the State, there are special acts in relation to the organization and jurisdiction of courts of special sessions, which will be noticed hereafter. In other parts of the State, the law upon this subject is uniform.

The courts of special sessions are the lowest criminal courts

¹ 2 R. S., 706, § 1, *et seq.*

² *Post*, page.

³ 2 R. S., 704, § 1; *post*, page.

⁴ 2 R. S., 746, § 32; *post*, page.

⁵ *Post*, page.

in the State—they were formerly held by three justices of the peace of the county, or by two such justices and one judge of the county courts, but by an act to reduce town officers and town and county expenses, it was provided that courts of special sessions shall be held by a single magistrate then authorized to sit as a member of a court of special sessions; and, further, that all offences then triable before such courts, might thereafter be tried before such single magistrate, with or without a jury, at the election of the prisoner, and all the provisions of law then applicable to the powers, duties and proceedings of such courts, were made applicable to such magistrate. and the proceedings before him.¹

Courts of special sessions are usually held by a justice of the peace, except in those cities and villages of the State where special legislation is made applicable to these courts. The recorders of the several cities in this State, are given by statute the same power in relation to the trial of criminals, as are given in this respect to a judge of the county court.²

Courts of special sessions except in the city and county of New York, and the city of Albany, have power to hear and determine charges for crime arising within their respective counties as follows:

1. All cases of petit larceny charged as a first offence.³
2. Cases of assault and battery not charged to have been committed riotously, or upon any public officer in the execution of his duties.
3. Charges for poisoning, killing, maiming, wounding or cruelly beating animals.
4. Charges for racing animals within one mile of the place where any court is held.
5. Charges for committing any willful trespass, or for severing any produce or article from the freehold, not amounting to grand larceny.
6. Charges for selling poisonous substances not labeled, as required by law.
7. Charges for maliciously removing, altering, defacing or cutting down monuments or marked trees.

¹ 2 R. S., 224, § 4; Laws 1845, ch. 180, § 15.

² Laws 1840, ch. 243; 2 R. S., 714, § 23.

³ 2 Cow., 815; 1 Cow., 151.

8. Charges for maliciously, breaking, destroying or removing mile-stones, mile-boards or guide-boards, or altering or defacing any inscription thereon.

9. Charges for willfully or maliciously destroying any public or toll-bridge, or any turnpike gate.

10. Charges against any person who shall be intoxicated while engaged in running any locomotive engine upon any railroad, or while acting as conductor of a car or train of cars on any such railroad.

11. Charges for setting up or drawing unauthorized lotteries, and for printing or publishing an account of any such illegal lottery, game or device, and for selling or procuring lottery tickets to be sold, and for offering for sale or distribution, any property depending upon any lottery, and for selling any chances in any lottery contrary to the provisions of article fourth, chapter twentieth, part first, title eight, of the fourth edition of the Revised Statutes.

12. All charges for running, trotting or pacing horses, or any other animals.

13. All offences against the laws relating to excise, and the regulation of taverns and groceries.

14. Charges for voting more than once at the same election, or procuring illegal votes.

15. Charges for making or vending any slung shot, or any similar weapon.

16. Charges for unlawfully disclosing the fact of any indictment being found.

17. Charges for unlawfully bringing to, or carrying letters from, any State prison.

18. Charges for unlawfully, willfully or maliciously destroying or injuring any mill-dam, or embankment necessary for the support of such dam.

19. Charges for unlawfully, intentionally or willfully injuring any telegraph wire, post, pier, abutment, materials or property belonging to any line of telegraph.

20. Charges for unlawfully, knowingly and willfully counterfeiting any representation, likeness, similitude or copy of the private stamp, wrapper or label of any mechanic or manufacturer.

21. Charges for malicious trespass on lands, trees or timber, or injuring any fruit, or ornamental or shade tree.

22. Charges for maliciously or willfully breaking or lowering any canal walls, or wantonly opening any lock gate, or destroying any bridge, or otherwise unlawfully injuring such canal or bridge.

23. Charges for unlawfully counterfeiting or defacing marks on packages.

24. Charges for unlawfully and negligently setting fire to wood or fallow land, or allowing the same to extend to lands of others, or unlawfully refusing to extinguish any fire.

25. Charges for unlawfully cutting out, altering or defacing any mark on any logs, timber, wood or plank, floating in any of the waters of this State, or lying on the banks or shores of any such waters, or at any saw-mills, or any islands, where the same may have drifted.¹

26. Charges for offences against the provisions of chapter 573, of laws of 1853, and the act amendatory thereof, chapter 222, laws of 1865, for the prevention of wanton and malicious mischief.²

The statute above referred to, further provides that courts of Special Sessions, except in the city and county of New York and city of Albany, shall, in the first instance, have exclusive jurisdiction to hear and determine charges for crimes and offences within their respective counties, in the following cases :

1. Charges against any persons driving any carriages upon any turnpike road or highway in this State, for running or permitting their horses to run.

2. Charges for racing, running or testing the speed of any horse or other animals, within one mile of the place where any court shall be sitting.

3. Charges for cruelty to animals, contrary to law.

4. Charges for cheating at games.

5. Charges for winning or losing at any game or play, or by any bet, twenty-five dollars within twenty-four hours.

6. Charges for selling liquor in any court house contrary to law, and for selling liquor in jails contrary to law.³

¹ 2 R. S., 711, § 1; Laws 1857, ch. 769, § 1.

² Laws 1866, ch. 467. See 5 Park., 185.

³ 2 R. S., 711, § 2; Laws 1857, ch. 769, § 2.

Courts of special sessions have jurisdiction to hear and determine charges for misdemeanors committed within their respective counties, in violation of the statutes, prohibiting the selling or giving to Indians residing in their counties, of spirituous liquors or intoxicating drinks.¹ And also of certain violations of the non-imprisonment act, where property of the value of fifty dollars or less is removed from the county, to prevent its being levied upon, or is secreted, assigned, conveyed, or otherwise disposed of, with intent to defraud creditors, or to prevent the payment of debts; for the person removing and the person receiving the property with such intent, such cases are guilty of a misdemeanor, and may be tried in a court of special sessions.²

They have also jurisdiction to try for misdemeanors, in removing oysters from oyster beds.³

Upon a complaint against a person for being a disorderly person, the magistrate cannot proceed to organize a court of special sessions, and, on conviction, punish the accused by fine and imprisonment.⁴

Most of the special acts conferring jurisdiction upon the courts of special sessions in particular localities, were passed prior to the act of 1857, above cited, which conferred general powers of jurisdiction upon the courts of Special Sessions in the State, except in the city and county of New York and the city of Albany, but a synopsis of the jurisdiction of those courts in particular localities is hereafter given. In several of the cases where local jurisdiction is given, the acts of the Legislature also provide that those courts shall have jurisdiction to hear and determine the complaints, whether the prisoner shall request to be tried or not. Under the decisions in the Court of Appeals, the special legislation upon this subject, requiring the defendant to be tried in a Court of Special Sessions, and in effect denying him the right to give bail to appear before a tribunal where a common law jury of twelve men could be obtained, is unconstitutional

¹ 2 R. S., 711; Laws 1849, ch. 420.

² Laws 1830, ch. 300, § 26.

³ Laws 1866, ch. 753, § 2, vol. 2, p. 1635.

⁴ *Peo. v. Carroll*, 3 Park., 73.

and void, on the ground that the party accused is thereby deprived of the right of trial by jury, guaranteed by the constitution.¹

Justice Parker, after reviewing the history of the court of Special Sessions since its first organization, and commenting upon its powers and jurisdiction, held, that a provision denying to a person arrested in this court the right to give bail, and compelling him to be tried by the magistrate as a Court of Special Sessions, would be unconstitutional and void, and that the right to this election on the part of the accused even in the smallest offences triable in a court of Special Sessions, has always existed in this State, and existed in full force and unimpaired at the time of the adoption of the present constitution.²

SECTION II.

SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.

This court was formerly held by any three of the police justices of said city and county, who were to set alternately, except that one of their number might be selected to preside,³ but by the act of 1865,⁴ it is now held by the two police justices, elected respectively in the Second and Sixth Judicial Districts of said city and county, and the said justices now exclusively possess and exercise all the powers heretofore possessed and exercised by the said Court of Special Sessions as the said court was theretofore organized and held.⁵ In case of the sickness, absence or disability of either of the said two police justices, it is lawful for the other to hold the court.⁶

The New York General Term, in a case brought before them upon appeal from this court, said :

We think there is no authority for one justice to hold a court of Special Sessions, except in the case stated in the act. The provision allowing one justice to hold the court in the absence of the other, must be construed as providing for an absence from

¹ *Peo. v. Tonybee*, 2 Park. Cr. R., 490.

² *Peo. v. Kennedy*, 2 Park. Cr. R., 312.

³ *Laws* 1858, ch. 282, § 8, p. 442.

⁴ *Laws* 1865, ch., 563, § 1, p. 1132.

⁵ *Id.*

⁶ *Id.* § 4. Vide, *Laws* 1860, ch. 508, § 6, p. 1007.

the city. It never can be sanctioned that the law which requires two justices to hold a court can be evaded by allowing one justice to absent himself from the court and yet remain in the city, able to discharge the duties of his office. The law requires both justices to hold the court, while in the city, able to discharge their duties, and the record should show, if the two justices are not present, the absence from the city, or such other cause as is provided in law for the court being held by one justice.⁵ It has a clerk and a deputy clerk,⁶ and has power to hear, punish and determine, according to law, all complaints for misdemeanors, and possesses exclusive jurisdiction thereof, unless the said court of Special Sessions shall order any such complaint to be sent to the Court of General Sessions, and unless the accused when arrested and brought before the committing magistrate shall elect to have his case heard and determined by the court of General Sessions, in and for the city and county of New York.⁷ This court also has power by warrant, issued in the name of any of the justices authorized to hold said court, and signed by the clerk thereof, and entered in the minutes, to enforce its judgments and orders, to bring before said court all accused persons for trial or judgment in all cases in which they have jurisdiction, to issue subpoenas for the attendance of witnesses, attachments for contempt and other process necessary for the proper conduct of said court, the same to be tested in like manner, and signed by said clerk and subpoenas issued for the attendance of witnesses in said court, shall be served by some proper person or persons under the direction of the clerk thereof.⁸ It is the duty of the clerk of this court or his deputy to enter all the proceedings of said court, and the sentences on all convictions had therein, in full, in a book of minutes, to be by him kept for that purpose, to administer the oath or affirmation required by law to be administered in said court, to issue all subpoenas for witnesses on the part of the people, to furnish, when required, the necessary blanks for witnesses on the part of the defence; and whenever sentence shall be pronounced upon any person convicted of any offence in said Court of Special Sessions, the clerk thereof shall, as soon as may

* Case of Joseph Lynn, reported in New York World.

† Id. § 1; Id. § 3.

‡ Laws 1855, ch. 337, § 5.

§ Laws 1859, ch. 491, § 2, p. 1129.

be, make out and deliver to the sheriff of the said city and county, or his deputy, a transcript of the entry of such conviction in the minutes of the said court, and of the sentence thereupon, duly certified by the said clerk, which shall be sufficient authority to such sheriff or deputy to execute such sentence, and he shall execute the same accordingly.¹ All fines imposed by said court are to be received by the clerk thereof, who is to return the same monthly, under oath, to the Chamberlain of the city.² Transcripts of convictions had in this court are not required to be certified by the magistrates holding said court or to be filed; but a duly certified copy of any such conviction made by the clerk of said court is evidence in all courts and places of the facts therein contained.³

SECTION III.

SPECIAL SESSIONS IN THE CITY OF BROOKLYN.

Either of the justices of the peace, or the police justices of the city of Brooklyn, has power to hold a Court of Special Sessions alone, and has jurisdiction, also, other than that heretofore given them to try any person arrested in said county, who may be brought before them, or either of them, charged with an affray, riot, malicious mischief, or cruelty committed to any animal, committed within said county; and in all cases which are triable in such Court of Special Sessions, the party accused shall not be required to give bail to appear at any other court of criminal jurisdiction, unless the city judge of said city, the county judge of said county, or a justice of the Supreme Court, shall certify that the charge is one that ought to be tried in some other criminal court; and no justice of the peace, other than the police justice and the justices elected in the city of Brooklyn, shall have or exercise any civil or criminal jurisdiction in said city.⁴

¹ 2 R. S. 224, §§ 7, 8; Laws 1858, ch. 282, §§ 2, 3.

² Id. § 9; Id. § 4.

³ Id. § 16; Id. § 5.

⁴ 2 R. S., 224, § 39; Laws 1849, ch. 125, § 33; amended 1850, ch. 102, § 16.

SECTION IV.

SPECIAL SESSIONS IN THE CITY OF ALBANY.

There is to be held in the City Hall, of the city of Albany, on Tuesday of each week, by the recorder of said city, or in case of his absence or inability, by the county judge of the city and county of Albany, together with one or more of the justices of the peace of said city, to be associated with such recorder or judge, a Court of Special Sessions, which shall have power to hear and determine all cases of petit larceny charged as a first offence, and all misdemeanors, not being infamous crimes; and which may be held and continued for such length of time as said court shall deem proper.¹

The various special provisions of the statute applicable to this court, will be found in the third volume of the fifth edition of the Revised Statutes, page 371, &c. (2 R. S., 224, § 15), and in the Laws of 1849, chapter 150, and 1851, chapter 481; Laws of 1852, chapter 265; Laws of 1855, chapter 256.

SECTION V.

SPECIAL SESSIONS IN UTICA.

All courts of Special Sessions in said city, under the Revised Statutes, were to be held by the recorder and two aldermen of the city, who were to be notified to attend said court by the recorder; and said court was invested with all the authority devolved upon courts of special sessions for the trial, conviction and punishment of offences, and in the summoning of jurors for such trial. The recorder was also invested with all the authority possessed by any justice of the peace in hearing complaints, issuing process, causing arrests, compelling the attendance of witnesses, taking examinations and recognizances, letting to bail, binding over and committing in criminal cases.

By the Revised Statutes, it was also provided that if the recorder was absent or unable to attend, on the return of any warrant issued pursuant to the act creating the court, in such case any judge of the county courts of said county (of Oneida),

¹ 2 R. S., 224, § 15; Laws 1849, ch. 150, § 1.

or the mayor of the city, might perform any of the powers vested in said recorder for the examination, trial and punishment of the defendant arrested on said warrant; and it was made the duty of the aldermen of said city to attend such court of Special Sessions when notified to do so by the said recorder, judge or mayor in the cases provided for by the act.¹

By a subsequent act, it was provided that no justice of the peace of the city of Utica shall take any examination or recognizance, let to bail, issue subpoenas, or commit to prison in any criminal case, and that the recorder of the city should have exclusive jurisdiction of complaints and proceedings under the acts concerning beggars, vagrants, disorderly persons and offenders against the provisions of the excise law of 1857, arising in the city; but in the absence of the recorder from the city, or in case of a vacancy in the office, or of his inability to perform the duties of his office, the justices of the peace in said city were authorized to exercise jurisdiction in all the cases mentioned above.²

SECTION VI.

SPECIAL SESSIONS IN OSWEGO.

The Recorder of Oswego, as Police Justice, in addition to his other powers, has all the powers of justices of the peace in criminal matters and proceedings, and while holding courts of Special Sessions, in addition to, and including the cases now specified, has power, and it is his duty to try, unless for good cause shown, he shall order the same to be put over, the following offences committed within his jurisdiction: All cases of malicious mischief or injury, all offences against public decency, selling unwholesome provisions, cheats, breaches of the peace, cruelty to animals, disobeying the commands of officers to render assistance in criminal cases, violating the laws and ordinances relating to health applicable to said city, obstructing officers in the discharge of their duties, adulterating distilled spirits, cheating at play, winning or losing twenty-five dollars within twenty-four hours, not delivering marked property, driver of carriage running his horses, defacing marks or putting false marks on float-

¹ 2 R. S., 224, § 40; Laws 1844, ch. 319, § 6; Id. 1845, ch. 180, § 15.

² Laws 1861, ch. 4, §§ 1, 2, p. 11.

ing timber, all offences against the laws and ordinances relating to excise and the regulation of taverns and groceries applicable to said city, all cases of drunkenness, all violations against the laws and ordinances of the city of Oswego, when such violation is a misdemeanor, and all attempts to commit any of the offences herein named or referred to, when such attempt shall be a misdemeanor.¹

SECTION VII.

SPECIAL SESSIONS IN THE COUNTY OF MONROE.

Courts of Special Sessions in the county of Monroe, in addition to the powers vested in said courts by the first and second sections of chapter seven hundred and sixty-nine of the laws of eighteen hundred and fifty-seven,² has exclusive jurisdiction to hear, try and determine charges for crimes and offences hereafter mentioned, arising within said county, provided, however, that the accused in such cases shall have the right to demand a trial by jury, and the proceedings and conviction of any such court may be removed by writ of certiorari to the Court of Sessions of the county, as is now provided by law :

1. All cases of petit larceny not charged as a second offence.
2. Cases of assault and battery not charged to have been committed riotously, or upon any public officer.
3. Cases of intoxication arising under the seventeenth section of an act entitled, "an act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April sixteenth, eighteen hundred and fifty-seven.³

SECTION VIII.

SPECIAL SESSIONS IN ELMIRA.

The recorder of Elmira, except in the case of his absence from the city, or inability from sickness or other cause to act, has jurisdiction, exclusive of any justice of the peace or other offi-

¹ 2 R. S., 224, § 41; Laws 1849, ch. 134, § 2.

² Ante, p. 31; 2 R. S., 711, §§ 1, 2.

³ Laws 1860, ch. 57, § 1.

cer in said city, except the mayor and judges of courts of record, to issue all criminal process, and all process other than in civil actions, which a single justice or two justices of the peace in towns are empowered or directed by law to issue ; to hear all complaints and conduct all examinations in criminal cases ; to hold Courts of Special Sessions, with all the power and jurisdiction of such courts, as regulated by statute ; to try, convict and sentence all persons who may be guilty of any offences which are triable by courts of Special Sessions ; and to commit for trial all persons who shall be guilty of felonies not triable in such courts.¹

SECTION IX.

SPECIAL SESSIONS IN HUDSON.

The police justice of this city has authority to exercise all the powers and discharge all the duties, and is subject to all the provisions of law conferred or imposed upon or applicable to justices of the peace in criminal cases in the several towns of this State.²

SECTION X.

SPECIAL SESSIONS IN TROY.

In this city, one of the justices of the Justices' Court therein is selected by the common council as police justice, who has authority, subject to the provisions of the statute, to hear and determine charges for crime and offences within the said city, in the cases enumerated in section first, article first, title third, chapter second of the fourth part of the Revised Statutes ;³ and also on complaints and charges against any person for the commission of any of the acts or offences designated in the first section of title fifth, chapter twentieth of the first part of the Revised Statutes ; and upon conviction of any such offender, it has power to punish, by fine not exceeding fifty dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and

¹ Laws 1864, ch. 139, p. 295.

² 2 R. S., 224, § 190 ; Laws 1854, ch. 179 ; amended 1857, ch. 559.

³ Ante, page 31 ; 2 R. S., 711, §§ 1, 2.

imprisonment of disorderly persons.¹ When any person charged with any such offence as is above specified shall be brought before the said police justice, or any other justice of said court designated to act in his place, it shall be his duty forthwith to hear, try and determine such complaint or prosecution, according to the provisions of article first, title third, chapter second of the fourth part of the Revised Statutes, whether the persons charged with such offence request to be tried or not, and no other court or magistrate has jurisdiction to try such person for such offence; and before entering upon such trial, such justice may, in his discretion, adjourn the hearing or trial thereof from time to time, for a period not exceeding fifteen days, unless upon good cause shown, such justice may deem a longer time necessary for the purpose of procuring material testimony, either on the part of the people or the accused, which time shall not exceed ninety days; and said justice may commit the accused to jail until such day, or suffer such accused to go at large, upon his or her executing to the mayor, recorder, aldermen and commonalty of said city, and filing with said justice a bond, to be approved by him, in the penalty of not exceeding three hundred dollars, conditioned for the personal appearance of such accused before such justice on the day to which said hearing or trial shall be adjourned, and that he will not depart therefrom without leave of the court.²

COUNTY OF RENSSELAER.—When any person charged with any offence specified in article first, title third, chapter second of the fourth part of the Revised Statutes;³ or with the commission of the acts or offences enumerated in section first, title fifth, chapter twentieth of part first of the Revised Statutes, of disorderly persons, &c.; or with being guilty of malicious mischief, when the damage charged to have been done shall be less than twenty-five dollars; or with vagrancy; or with indecently exposing their person; or by tumultuous or riotous conduct, disturbing the public peace; or with fighting, or being engaged in any affray; or with being intoxicated, under such circumstances as to amount to a violation of public decency, shall be brought before any justice of the peace of the county of Rensselaer, such justice shall, upon the conviction of such offender, have power to punish him by

¹ 2 R. S., 224, § 224; Laws 1849, ch. 340, § 3.

² 2 R. S., §§ 224, 226; Laws 1849, ch. 340, § 5.

³ Ante, page 31; 2 R. S., 711, §§ 1, 2.

fine not exceeding fifty dollars, or by imprisonment in the county jail of said county, at hard labor, for a term not exceeding six months, or by both such fine and imprisonment; and all persons who shall abandon their wives or children, without adequate means of support, or shall neglect or refuse to support them according to their ability, are to be deemed disorderly persons, within the meaning of the Revised Statutes, for the purposes of trial and punishment, as above prescribed.¹ The provisions of the statute above referred to, in relation to the Police Court of the city of Troy, are also made applicable to Courts of Special Sessions held by justices of the peace in the county of Rensselaer, so far as trying the prisoner, whether requested by him or not, and in relation to the adjournment of the trial and taking bail, except the bond is not to exceed one hundred dollars, and is to be executed to the people of the State of New York, and the period of adjournment for procuring testimony is not to exceed twenty days.²

SECTION XL

SPECIAL SESSIONS IN THE VILLAGE OF LANSINGBURGH.

The above mentioned provisions in regard to the county of Rensselaer, are modified so far as regards the village of Lansingburgh, in said county, as follows: The police justices of said village have jurisdiction and authority to hear, try and determine, in the manner now provided by law, all complaints and charges for criminal offences, in the cases enumerated in section first, article first, title third, chapter second, of the fourth part the revised statutes, except that bail shall not be taken in such cases to the next criminal court of the county; but it shall be the duty of justice, before whom the complaint shall be made, to proceed with the trial of the person charged with the offence, whether such trial be requested or not, within twenty-four hours after such person shall be brought before him, unless upon good cause shown such police justice, may deem a longer time necessary for procuring material testimony, in which case the hearing or trial may be further postponed for a period not exceeding fifteen days.³

¹ Laws 1855, ch. 290, §§ 1, 2.

² Id., § 3.

³ Laws 1864, ch. 204, p. 415.

CRIMINAL PRACTICE.

SECTION XII.

SPECIAL SESSIONS IN WILLIAMSBURGH.

The Police Justice of this city is authorized to try all criminal cases as a court of special sessions, that might formerly be tried at a court of special sessions in the town of Williamsburgh.¹

SECTION XIII.

SPECIAL SESSIONS IN POUGHKEEPSIE.

The Recorder of the village of Poughkeepsie has exclusive jurisdiction, as a court of Special Sessions, to try all criminal matters.²

SECTION XIV.

SPECIAL SESSIONS IN THE TOWNS OF WATERTOWN AND WATERVLIET.

The towns of Watertown, in the county of Jefferson, and Watervliet, in the county of Albany have each of them also special provisions of the statute applicable to these towns respectively, in relation to courts of Special Sessions held therein.³ The act regulating the police of the town of Watervliet, so far as it takes away from a person charged with an offence, the right to give bail for his appearance at the next criminal court having jurisdiction, is an infringement of the right of trial by jury, and is unconstitutional and void.⁴

SECTION XV.

SPECIAL SESSIONS IN ROCHESTER AND THE VILLAGE OF SARATOGA SPRINGS.

There are also special statutory enactments applicable to the city of Rochester and village of Saratoga Springs, in regard to

¹ Laws 1851, ch. 91

² Laws 1849, ch. 86.

³ Laws 1855, ch. 354; Laws 1854, ch. 118; 5th ed. R. S., vol. 3, p. 1002.

⁴ *Peo. v. Carrol*, 3 Park. 22; Laws 1850, 210.

the courts of Special Sessions to be held in each of those places respectively.¹

SECTION XVI.

COURTS OF SESSIONS.

It is provided by the Constitution of this State that the county judge, with two justices of the peace, to be designated according to law, may hold Courts of Sessions with such criminal jurisdiction as the Legislature shall prescribe, and perform such other duties as may be required by law.² The method and manner of electing the Justices of Sessions above named, is pointed out by the Revised Statutes.³ They are chosen from two of the justices of the peace of the county. When one of the members of a Court of Sessions is absent, or is, by interest or otherwise, disqualified from acting in a particular cause, or proceeding it is the duty of the county judge to designate some other justice of the peace of the county to supply the vacancy, and who shall compose a member of the court during the hearing, trial and determination of such cause or proceeding.⁴ And in case both the designated justices fail to attend, the county judge may supply both vacancies.⁵

Courts of Sessions except in the city and county of New York, are held in the respective counties at such time as the county judge of the county shall, by order, designate; and the county judge shall in such order designate at which terms of the Sessions a grand or petit jury, or both, or neither, shall be required to attend, and no grand or petit jury shall be required to be drawn or summoned to attend any term of the Court of Sessions which shall be designated by the county judge to be held without such jury; the above mentioned order is to be published in a newspaper printed in the county for four successive weeks previous to the time of holding the first term of said court under such order.⁶

¹ Laws 1844, p. 161, ch. 145; Laws 1845, ch. 294, § 3.

² Const. N. Y., Art. 6, § 14.

³ 2 R. S., 204, § 11.

⁴ Baldwin v. McArthur, 17 Barb., 414. Vide, Id. 410; Laws 1861, ch. 96, § 2, p. 172.

⁵ Cyphers v. Peo., 31 N. Y., 373, 5 Park. 666.

⁶ 2 R. S., 208, § 1; Laws 1851, ch. 444.

Since the passage of the above act, a Court of Sessions cannot be held except in pursuance of a previous order of a county judge, made under the authority of that act, and in conformity therewith, designating the times for the purpose, and published as therein directed; and when an indictment was found at a term not legally appointed, and a plea in abatement setting up such illegality, was interposed and overruled by the Court of Sessions on demurrer, the case having been removed into the Superior Court by certiorari, the conviction was reversed, and the proceedings of the Sessions were quashed.¹

But the omission of a county judge to designate in an order for terms of the Court of Sessions, any terms to be held without a jury, does not render the court null, or deprive it of power to empanel a grand jury.²

The Judiciary Act³ declares that the Courts of Sessions of the respective counties organized by said act, shall possess the same powers and exercise the same jurisdiction in their respective counties as were then possessed and exercised by the Courts of General Sessions of the Peace, so far as the same were consistent with the constitution and the provisions of said act, and all laws relating to the said Courts of General Sessions of the Peace, the jurisdiction, powers and duties of said courts, the proceedings therein and the officers thereof, and their powers and duties were made applicable to the Courts of Sessions organized by said act, their powers and duties, the proceedings therein, the officers thereof, and their powers and duties, so far the same could be so applied, and are consistent with the constitution and provisions of said act.

Every Court of Sessions has power :

1. To inquire, by the oaths of good and lawful men of the county, of all crimes and misdemeanors committed or triable in such county.

2. To hear, determine and punish, according to law, all crimes and misdemeanors not punishable with death, or by imprisonment in the State prison for life.

3. To hear and determine all appeals from any order of jus-

¹ *Peo. v. Moneghan*, 1 Park., 570.

² *Cyphers v. Peo.*, 31 N. Y., 373; 5 Park., 666.

³ *Laws* 1847, ch. 280, p. 332.

tices of the peace, under the laws respecting the support of bastards.

4. To examine into the circumstances of persons committed to prison as parents of bastards, and to discharge them in the cases provided by law.

5. To hear and determine the complaints which shall be made to such court, under the laws respecting masters' apprentices and servants.

6. To review the convictions of disorderly persons actually imprisoned, and to execute the powers conferred, and duties imposed, by law in relation to such persons.

7. To continue or discharge the recognizances and bonds of persons bound to keep the peace, or to be of good behavior, or both; and to inquire into and determine the complaints on which the same were founded.

8. To compel the relatives of poor persons, and committees of the estates of lunatics, to support such persons and lunatics in the cases and in the manner prescribed by law.

9. To exercise the powers conferred by law in relation to the estates of persons absconding and leaving their families chargeable to the public.

10. To let to bail persons indicted in the said court for any crime or misdemeanor triable therein, as provided by law.

11. To discharge persons who shall have remained in prison without being indicted, or without being tried, in the cases prescribed by law.

12. To execute such other powers and duties as may be conferred and imposed by the laws of this State.¹

They have no power to arraign a defendant and receive a plea to an indictment for murder.²

Neither has a Court of Sessions power to direct a *nolle prosequi* to be entered on an indictment pending therein for an offence not triable in that court.³

During the term for which any Court of Sessions may be held by law, any judge of the County Courts may open and hold such

¹ 2 R. S., 209, § 5.

² *People v. McCraney*, 21 How., 149.

³ *People v. Porter*, 4 Park., 524.

sessions for the purpose of taking recognizances from parties and witnesses.¹

The Courts of Sessions of the several counties in this State have also power to grant new trials, upon the merits or for irregularity, or on the ground of newly discovered evidence, in all cases tried before them.² The above provisions should be strictly followed. The application for a new trial must be made before judgment, as is the case in courts of civil jurisdiction. The statute does not give power to set aside a judgment regularly entered.³

There have been conflicting decisions as to whether the above provision extends to the court of General Sessions in the city of New York.⁴ But the Court of Appeals have held the General Sessions of the Peace, in New York city, to be but a Court of Sessions for that county.⁵

The several Courts of Sessions are also to send all indictments for offences not triable therein, to the next Court of Oyer and Terminer and jail delivery, to be held in their respective counties, there to be determined according to law.⁶ The said courts may also, by an order to be entered in their minutes, send all indictments for offences triable before them against prisoners in jail, and others which shall not have been heard or determined, to the next Court of Oyer and Terminer and jail delivery, to be held in their respective counties, to be there determined according to law; and if any such indictment shall be remitted back without trial by the Court of Oyer and Terminer and jail delivery, to the court from which it came, such court may proceed thereon.⁷ They may also return or remit, an indictment to the Oyer and Terminer held in the same county, which was originally found in and remitted from the Oyer and Terminer.⁸

Under the provisions of the Revised Statutes, if a sufficient number of persons authorized to hold any of the said Courts of Sessions, shall not attend before five o'clock in the afternoon of

¹ 2 R. S., 748, § 49.

² Laws 1859, ch. 339, § 4; 1857, ch. 769, § 3, sub. 2

³ *People v. Donnelly*, 21 How., 406.

⁴ *People v. Powell*, 14 Abb., 91, contra; 15 id., 59.

⁵ *Lowenbery v. People*, 27 N. Y., 336.

⁶ 2 R. S., 209, § 6.

⁷ 2 R. S., 209, § 7.

⁸ *Peo. v. Gay*, 10 Wend., 509.

the day on which such court is to be held, it was the duty of any judge of the County Courts who should attend, or if there be none present, of the sheriff or clerk of the county, to adjourn the same court to the next day;¹ and if a sufficient number to hold such court should not attend before five o'clock in the afternoon of the said adjourned day, it became the duty of such judge of the County Courts, or if there be none present, of such sheriff or clerk to adjourn the said court without day;² and when any Court of Sessions appointed to be held in any county should fail, no writ, process, recognizance or other proceeding, returnable at, or to be heard or tried in said court, was to be abated, discontinued or rendered void thereby;³ but under the subsequent acts authorizing the county judge to appoint other justices of the peace of the county to fill the places of those members of the court who might be absent, it is to be presumed that the sections of the statute above cited need not apply, except in the case of the absence of the county judge himself. In any cause or proceeding that shall be pending in any Court of Sessions of the State, except in the city and county of New York, in which the county judge shall, for any cause, be incapable of acting, the Court of Sessions shall, by rule, transfer the same to the Court of Oyer and Terminer, which shall have the same jurisdiction that Courts of Sessions have in such cases.⁴

The county judge, at the time of drawing the jurors for the Courts of Sessions, may designate any day during the term that he may deem expedient, in which the petit jurors shall be required to attend for the trial of issues of fact, and it is the duty of the sheriff to summon the petit jurors to attend the court on such day.⁵

It is by statute declared lawful for the Court of Sessions of any county in the State, to continue its sittings at any term thereof, so long as it may be necessary, in the opinion of such court, for the dispatch of any business or the determination of any cases that may be pending before such court; and they may, in their

¹ 2 R. S., 210, § 8.

² *Id.* § 9.

³ *Id.* 210, § 24.

⁴ Laws 1861, ch. 96, § 1, p. 172.

⁵ Laws 1861, ch. 8, p. 14.

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discretion, exercise all the powers in regard to adjournments thereof, from time to time, which are by law conferred upon, or exercised by the court of Oyer and Terminer, in relation to adjournments of said last mentioned court.¹

This act also applies to the Court of General Sessions in the city New York.²

SECTION XVII.

THE CITY COURT OF BROOKLYN.

The City Judge of Brooklyn, with the Mayor and an Alderman, or with any two Aldermen of said city, or in case of the absence of said city judge, or of his inability to attend, or vacancy in said office, the Mayor and any two Aldermen of said city may, and shall, hold a court of criminal jurisdiction, which shall be called the City Court of Brooklyn, which shall have criminal jurisdiction to the same extent, and in the same manner, and with the same powers as the Court of Sessions of the several counties of the State, in the indictment and trial of all offences committed in the said city.³ When an indictment shall be found in the Court of Oyer and Terminer, or in the Court of Sessions of the county of Kings, for any offence above specified, triable by a Court of Sessions, either of said courts in which such indictment shall be, may order the same to be transmitted to the said City Court, and shall bind, by recognizance, in the manner now prescribed by law, the witnesses and the party or parties to said indictment, to appear in the said City Court, at the next term thereof; and when any recognizance thus taken shall have become forfeited, the same may be prosecuted in the said City Court. The said City Court has also power, in their discretion, to remove such indictment, and to remit any indictment found in the said City Court, to the said Court of Oyer and Terminer or Sessions.⁴ And whenever any bill of indictment for any offence shall have been transmitted to said City Court, pursuant to the above provisions, the proceedings thereon shall be in all respects the same

¹ Laws 1859, ch. 208, p. 465.

² Lowenberg v. Peo., 5 Park., 414. Vide Laws 1862, ch. 10.

³ 2 R. S., 219, § 11.

⁴ 2 R. S., 219, § 12.

as on an indictment in a Court of Sessions.¹ The several provisions of the statute in relation to the officers of this court, the manner of summoning juries, &c., will be found in 2 R. S., 219, § 1, *et seq.*, as amended, Laws 1863, ch. 66.

SECTION XVIII.

THE SUPERIOR COURT OF THE CITY OF BUFFALO.

This court has also criminal jurisdiction, as follows :

1. To inquire, by a grand jury, of all crimes and public offences committed in the city of Buffalo.
2. To try and determine all indictments found therein, or sent thereto by another court, for a crime or public offence committed in that city.² This court was formerly known as the Recorder's Court of Buffalo, but was reorganized under its present name,³ and is composed of three justices, chosen by the electors of the city of Buffalo for the term of eight years.⁴ The said Superior Court may send any indictment pending therein, undetermined, to the Court of Oyer and Terminer, or to the Court of Sessions of that county, to be determined according to law ;⁵ and it has exclusive power to remit fines imposed and recognizances estreated by it.⁶ This court, for the trial of indictments and the transaction of criminal business, is to be held either by two of the justices thereof, or by one of the justices thereof, and two of the justices of the peace of said city, to be named by the justice of the said court, designated to hold such court.⁷ And the said court, at the general term thereof, has exclusive power in criminal cases on motion, on the indictment, with or without a bill of exceptions, to review its decisions and judgments, and grant new trials ; and the Court of Appeals has exclusive jurisdiction to review the decisions and judgments, made at the General Term, in criminal cases, in the same cases and in the same

¹ 2 R. S., 219, § 11.

² 2 R. S., 219, § 133 ; Laws 1854, ch. 96, § 29 ; as amended 1857, ch. 361, § 30.

³ 2 R. S., 219, § 103 ; Laws 1854, ch. 96, § 1.

⁴ *Id.*, § 104 ; *Id.*, § 1.

⁵ *Id.*, § 134 ; *Id.*, § 32.

⁶ *Id.*, § 135 ; *Id.*, § 33.

⁷ 2 R. S., 219, § 136 ; Laws 1857, ch. 361, § 34.

manner as if made by the Supreme Court.¹ By the act reorganizing the Recorder's Court of Buffalo into the Superior Court, it was provided that all the provisions of law then in force, relating to the Recorder's Court of Buffalo, and not inconsistent with the provisions of said act, should apply to the Superior Court as reorganized.²

SECTION XIX.

THE RECORDER'S COURT OF THE CITY OF OSWEGO.

The Recorder of the city of Oswego, with the Mayor and any Aldermen, or with any two Aldermen of said city, or in case of the absence of said Recorder, the Mayor and any two Aldermen of said city may hold a court of criminal jurisdiction, which shall be called the Recorder's Court of the city of Oswego, which has criminal jurisdiction to the same extent, and in the same manner, and with the same powers, as Courts of Sessions of the several counties of the State in all criminal matters and proceedings whatsoever within its jurisdiction, and in the indictment and trial of all offences committed in said city, or committed in this State, on board of any vessel, boat or float navigating or floating on any river, lake or canal, which vessel, boat or float shall come within the jurisdiction of said court, or shall pass through, into or from the said city of Oswego, on the same voyage or trip; and in all cases of larceny or embezzlement, in which the property stolen or embezzled shall be brought or found within such jurisdiction; and all recognizances in matters of which such court has jurisdiction, may be returnable at such court, and conditioned for the appearance of persons thereat.³ The said court has also exclusive power to remit fines and recognizances estreated by it.⁴ When any indictment shall be found in the Court of Oyer and Terminer, or in the Court of Sessions of the county of Oswego, for any offence above specified, triable by a Court of Sessions, either of the said courts in which said indictments shall

¹ 2 R. S., 219, § 137; Laws 1857, ch. 361, § 9.

² 2 R. S., 219, § 139; Laws 1854, ch. 96, § 37.

³ 2 R. S., 219, § 165; Laws 1848, ch. 374, § 3; amended 1849, ch. 134; and 1857, ch. 96, § 1.

⁴ 2 R. S., 219, § 166; Laws 1857, ch. 96, § 2.

be, may order the same to be transmitted to the said Recorder's Court, and shall bind by recognizance, in the manner now prescribed by law, the witnesses and the party or parties to said indictment, to appear at the next term thereof; and when any recognizance shall have become forfeited, the same may be prosecuted in the said Recorder's Court; and the said Recorder's Court has power, in its discretion, to remand such indictment, and to remit any indictment found in the Recorder's Court to the said Court of Oyer and Terminer or Sessions.¹

SECTION XX.

THE RECORDER'S COURT OF THE CITY OF UTICA.

The Recorder of the city of Utica, with two Aldermen of said city, to be selected by him from time to time, is to hold a court of criminal jurisdiction, which is called the Recorder's Court of the city of Utica; and such court has criminal jurisdiction to the same extent, and in the same manner, and with the same powers, as the Courts of Sessions of the several counties in this State, in the indictment and trial of all offences committed in said city.² When any indictment shall be found in the Court of Oyer and Terminer, or in the Court of Sessions of the county of Oneida, for any offence above specified, triable by a Court of Sessions, either of the said courts in which the indictment may be, may, in its discretion, order the same to be transmitted to the said Recorder's Court, and bind by recognizance in the same manner now prescribed by law, the witnesses and the party to said indictment to appear at the next term thereof; and when any recognizance thus taken shall have become forfeited, the same may be prosecuted in the said Recorder's Court.³ And whenever any bill of indictment, for any offence committed in said city, shall have been transmitted to said court, pursuant to the above provisions, the proceedings thereon shall be in all respects the same as on indictments in a Court of Sessions.⁴ The Recorder's Court of the

¹ 2 R. S., 219, § 169; Laws 1848, ch. 374, § 4.

² 2 R. S., 219, § 144; Laws 1844, ch. 319, § 3. See Courts of Special Sessions, in Utica, ante, § 5, page 38.

³ 2 R. S., 219, § 144; Laws 1844, ch. 319, § 4.

⁴ Id., § 143; Id., § 3.

city of Utica has also the same power as is possessed by Courts of Sessions to order indictments pending in said court to be removed therefrom to the Court of Oyer and Terminer ; and the provisions of the Revised Statutes, in relation to the removal of indictments before trial or judgment, when pending in the Court of Sessions, also apply to indictments pending in the said Recorder's Court.¹ The said Recorder's Court, when sitting as a criminal court, has the same power and jurisdiction concurrent with the Court of Sessions of the county of Oneida, in all cases arising in said city, respecting the support of bastards ; cases arising under the laws respecting masters's apprentices and servants ; reviews of convictions of disorderly persons ; recognizances of persons bound to keep the peace, and the complaints on which the same were founded ; all proceedings relative to poor persons ; committees of the estates of lunatics ; the estates of persons absconding and leaving their families chargeable to the public ; letting to bail of persons indicted ; discharging of persons remaining in prison without being indicted or tried, and all other proceedings, the subject matter of which shall arise or be within said city, and which are cognizable in said Courts of Sessions.²

SECTION XXI.

COURT OF GENERAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.

The Court of General Sessions is a local court, having jurisdiction in the city and county of New York. The Judges of the Court of Common Pleas, for the city and county of New York, elected pursuant to chapter 255 of the Laws of 1847, and the Mayor, Recorder, City Judge and Aldermen of the said city, or any three of them, of whom one of the said elected Judges, Mayor, or Recorder or City Judge shall always be one, have power to hold Courts of General Sessions in and for the said city and county of New York.³

This court is but a Court of Sessions for the county of New

¹ 2 R. S., 219, § 145 ; Laws 1846, ch. 95 ; 2 R. S., 732, § 86 ; post.

² 2 R. S., 219, § 158 ; Laws 1845, ch. 291, § 2.

³ 2 R. S., 216, § 58.

York. A Court of General Sessions of the Peace, and a Court of Sessions of any county, are one and the same tribunal.¹

This court has power to hear, determine and punish, according to law, all crimes and misdemeanors whatsoever, including crimes punishable with death, or imprisonment in the State prison for life; and all the provisions of law whatsoever existing, relating to Courts of Oyer and Terminer, and regarding trials for indictments for capital offences, and for offences punishable by imprisonment in the State prison for life, and regarding sentences therefor, and writs of error, bills of exceptions, certioraris and writs of habeas corpus, arising upon trials of such indictments, are made applicable to this court.² The Court of Oyer and Terminer, in and for the city and county of New York, may, by an order to be entered on its minutes, send all indictments for any crimes, including crimes punishable with death or imprisonment in the State prison for life, that may be in any way brought before said court, to the said court of General Sessions, to be there heard, tried and determined, according to law.³

It has power to send to the Court of Oyer and Terminer any case which it can try, if it deems expedient;⁴ and it may extend its terms and make adjournments.⁵

The whole of the Hudson river, southward of the northern boundary of the city of New York, and the whole of the bay between Staten Island and Long Island, is so far deemed within the jurisdiction of the city and county of New York, that all offences are cognizable in the courts of criminal jurisdiction held in and for the said city and county.⁶

SECTION XXII.

COURTS OF OYER AND TERMINER.

The Courts of Oyer and Terminer of the respective counties in this State, except in the city and county of New York, are to

¹ *Lowenbery v. People*, 27 N. Y., 336; 31 How., 140.

² *Laws* 1855, ch. 337, §§ 1, 2; *People v. Goodwin*, 18 John., 187.

³ *Id.*, § 3. Vide 2 Smith (16 N. Y.), 58.

⁴ *People v. Shefford*, 11 Abb., 59; 19 How., 446.

⁵ *Laws* 1862, ch. 10, p. 19.

⁶ 2 R. S., 745, §§ 29, 30.

be composed of a Justice of the Supreme Court, who shall preside, and the County Judge and the Justices of the Peace, designated as members of the Courts of Sessions. The presiding justice, and any two of the other officers above mentioned, have power to hold said courts. The courts are to be held at the same times and places that Circuit Courts of the same county are appointed to be held.¹

A Justice of the Supreme Court may preside at a Court of Oyer and Terminer during the year in which he is a Judge of the Court of Appeals.²

In the county of New York the Courts of Oyer and Terminer are composed of a Justice of the Supreme Court, who shall preside, and any two of the following officers: the Judges of the Court of Common Pleas of said city and county; the Mayor, Recorder and Aldermen of said city; and such courts are also to be held at the same time and place that Circuit Courts for that county shall be held.³

The Governor, by and with the consent of the Senate, may issue commissions of oyer and terminer and jail delivery, as often as occasion shall require, but some one of the Justices of the Supreme Court shall always be named in the commission as one of the commissioners, and no proceeding shall be had upon any such commission without the presence of such justice or judge. Every such commission shall specify the time and place at which the court is to be held in pursuance thereof, and is to be recorded in like manner as the commissions of civil officers, in the office of the Secretary of State. The Secretary of State is, without delay, to transmit to the district attorney of the county for which such commission shall have been issued, a copy thereof; and whenever it shall become necessary, by reason of the number of prisoners confined in the jail of any county, or by reason of the importance of the offences charged upon such prisoners, to appoint a special Court of Oyer and Terminer and Jail Delivery, a Justice of the Supreme Court, elected for the district within which such county shall be situated, has power by warrant, under his hand and seal, to appoint a Court of Oyer and Terminer and Jail Delivery for such county, to be held therein at some place

¹ 2 R. S., 204, § 9; Laws 1847, ch. 280, § 38.

² 2 Park., 183.

³ Id., § 10; Id., § 39. Vide 1 Park., 611.

provided by law, at such time as he may designate in such warrant, not less than thirty days from the date thereof. The justice issuing such warrant, is to forthwith transmit the same to the district attorney of the county.¹

The Judiciary Act² contains a similar provision in relation to Courts of Oyer and Terminer as to Courts of Sessions. That act provides that Courts of Oyer and Terminer shall possess the same powers, and exercise the same jurisdiction, as were possessed and exercised by the then Courts of Oyer and Terminer of the State, so far as the same are consistent with the constitution and the provisions of said act, and all laws relating to such existing Courts of Oyer and Terminer, and the jurisdiction, powers and duties of said courts, the proceedings therein, and the officers thereof, and their powers and duties, were made applicable to the Courts of Oyer and Terminer, as organized by said act, their powers and duties, the proceedings therein, and the officers thereof, and their powers and duties, so far as the same can be so applied, and are consistent with the constitution and the provisions of said act.

Courts of Oyer and Terminer have power :

1. To inquire by the oath of good and lawful men of the same county, of all crimes and misdemeanors committed, or triable in such county.

2. To hear and determine all such crimes and misdemeanors.

3. To deliver the jails of the said county, or city and county, according to law, of all prisoners therein.³

Every Court of Oyer and Terminer, and Jail Delivery, has also power to try all indictments found in the Court of Sessions of the same county, or city and county, which shall have been sent by order of such Court of Sessions to, and received by the said Court of Oyer and Terminer, or which shall have been removed into the said Court of Oyer and Terminer, and which, in the opinion of the said Court of Oyer and Terminer, may be proper to be tried therein.⁴

The several Courts of Oyer and Terminer and Jail Delivery, may also, by order entered in their minutes, send all indictments

¹ 2 R. S., 205-206, §§ 17 to 20. Vide 3 Park., 343.

² Laws 1847, ch. 280, p. 332.

³ 2 R. S., 205, § 14; Laws 1847, ch. 280, § 43.

⁴ 2 R. S., 205, § 15.

found at any such court for offences triable at the Court of Sessions of the same county, to be proceeded on and tried therein.¹

The Court of Oyer and Terminer has a discretion to refuse to try such indictments as in the opinion of the court may not be proper to be tried therein; and where an indictment has been found in the Sessions for an offence triable in that court, and the cause is subsequently removed into the Oyer and Terminer by an order of a Circuit Judge, the Oyer and Terminer has power to order the indictment to be sent back to the Sessions for trial, and without notice to the accused.²

Courts of Oyer and Terminer have also the same power to change the place of trial upon any indictment pending therein, as the Supreme Court has to change the place of trial in civil actions; and when the place of trial shall be so changed, the indictment shall be deemed to be pending in the Court of Oyer and Terminer of the county to which the place of trial has been so changed; and such court may proceed to try the same, and render judgment thereon.³

There has been considerable conflict in the decisions in this State as to the power of Courts of Oyer and Terminer to grant new trials upon the merits, but the Court of Appeals have held that the Oyer and Terminer has no power to order a new trial upon the merits after a conviction for felony.⁴

Whenever at the time appointed for the commencement of any term of the Court of Oyer and Terminer of this State, or at any time during such term, if either of the justices of the peace designated as members of the Court of Sessions of the county in which such term of court shall be held, shall not attend such court as a member thereof, the Justice of the Supreme Court, holding such Court in the absence of the County Judge of said county, may, at such term, designate some other justice of the peace of the county to supply the vacancy occasioned by such non attendance of any such justice, until the justice not attending, as aforesaid, shall attend such Court as a member thereof; but such designation by the Justice of the Supreme Court shall not authorize the justice designated by him to supply any such

¹ 2 R. S., 205, § 16.

² *Peo. v. Sessions, &c.*, 3 Barb., 144. See Laws 1855, ch. 337.

³ Laws 1859, ch. 462, p. 1074.

⁴ *Appo v. The People*, 6 Smith (20 N. Y.), 531.

vancancy at any other term than that at which such designation shall be made.¹

Any Justice of the Supreme Court may open and hold a Court of Oyer and Terminer at the time when the same shall have been appointed to be held, or to which it may have been adjourned, or during the sitting of any Circuit Court, for the purpose of taking recognizances from parties and witnesses.²

Whenever the office of District-Attorney of any county shall be vacant at the term of any Court of Oyer and Terminer, or Court of Sessions of any county, or the District-Attorney shall, for any cause be unable to attend the term of any such court, the members of the court, except the Justice of the Supreme Court, may designate some suitable person to act as District-Attorney at such term of the court; and the person so designated shall have, and exercise the same powers, and discharge the same duties as District-Attorneys, elected in the manner provided by law, and shall be entitled to such compensation, to be paid out of the treasury of the county, as the Board of Supervisors shall allow.³

The clerks of the several counties (the city and county of New York excepted), are, by virtue of their offices, Clerks of the Courts of Oyer and Terminer and jail delivery, within their respective counties; and the Clerk of the Court of General Sessions, in and for the city of and county of New York, by virtue of his office, is the Clerk of the Court of Oyer and Terminer, in and for said city and county.⁴

SECTION XXIII.

THE SUPREME COURT.

This Court has jurisdiction to review the determination of a Court of Sessions or of Oyer and Terminer, or of the Court of General Sessions after conviction, when the record is brought into that Court by writ of error or certiorari for review, and in cases where an indictment is removed into that court before trial, and it is carried down and tried at the Circuit Court.⁵

¹ 2 R. S., 206, § 39, Laws 1854, ch. 73, § 1. Vide Laws 1847, ch. 280, § 40; amended ch. 270, § 35.

² 2 R. S., 748, § 48.

³ Laws 1847, ch. 470, § 33.

⁴ 2 R. S., 206, §§ 27, 28, Laws of 1847, ch. 307.

⁵ 2 R. S., 733, § 94.

SECTION XXIV.

THE COURT OF APPEALS.

This Court has jurisdiction to review the determination of the Supreme Court, made at General Term, upon the review of criminal convictions when brought into that Court. The court of last resort in this State is the exclusive judge of its own jurisdiction, and its decision on that point cannot be questioned by the court below, when directed to carry into effect a judgment of reversal ; but where the jurisdictional question has not been decided by the court of last resort, it is open to examination in the court below.¹

¹ *Peo. v. Clark*, 1 Park., 360.

CHAPTER IV.

OF ARRESTS.

GENERAL REMARKS.

Section I.—ARREST BY PRIVATE PERSONS WITHOUT A WARRANT.

II.—ARREST BY AN OFFICER WITHOUT A WARRANT.

III.—ARREST BY OFFICERS WITH A WARRANT.

IV.—AS TO THE TIME AND MANNER OF MAKING THE ARREST.

V.—FUGITIVES FROM JUSTICE, AND THE OBTAINING OF REQUISITIONS FOR THE ARREST THEREOF UPON THE GOVERNORS OF OTHER STATES.

An arrest has been defined to be the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases; but no man should be arrested unless charged with such a crime as will at least justify holding him to bail when taken.¹

The authority of courts of this State to punish crimes committed within the State, other than treason, does not depend on the question whether the prisoner owed allegiance to the State or not. If the court obtain jurisdiction of the person of one not a citizen, they may punish his violation of the laws of this State, committed within the State.²

But a State has no jurisdiction of crimes committed beyond its territorial limits;³ thus bigamy is not punishable as an offence against the laws of this State, unless the second marriage took place within the territorial limits of this State.⁴

A late criminal author says, the subject of this chapter is one of considerable delicacy, and not quite free from difficulty. Its leading doctrines are plain and well established, but there are places at which its minute lines are indistinct and even uncertain;⁵ and without any distinct legislative provision, determining the necessary information pertaining to the rights and duties, both of the parties making the arrest and the party arrested, we are compelled to explore the doctrines of the common law for the sources of our information upon that subject.

¹ 4 Black. Com., 289; 8 Dan., 190; Burn's Just., tit. arrest.

² Adams v. People, 1 N. Y. (1 Com.), 173; 3 Den., 190.

³ People v. Merrill, 2 Park., 590.

⁴ People v. Mosher, 2 Park., 195.

⁵ 1 Bish. Cr. Pro., 612.

An eminent criminal writer has said, that officers of justice, often uneducated and overbearing men, either do not know or designedly exceed the bounds of their authority. The accused sometimes submits to illegal acts, at others, resists those to which he ought to submit; and that of all the cases of murder, manslaughter, violent assault and false imprisonment, reported in the books, no inconsiderable proportion will be found to have arisen from ignorance of rights and duties in granting warrants and in making arrests or resisting them, ignorance inevitable from the state of our laws, for the written law is silent, and the oracles who pronounce that which is unwritten only, speak when the case has already happened.¹ In the discussion of this important branch of the criminal law, an examination will be made of the cases in which an arrest can be made by a private person without a warrant; the cases in which an arrest is made by an officer of the law, with a warrant and without one, the manner of making the arrest, and the rights of the persons arrested and making the arrest.

SECTION I.

OF THE ARREST BY PRIVATE PERSONS WITHOUT A WARRANT.

This branch of the subject naturally divides itself into two classes of cases. First: Where the person is arrested in the act of committing the offence. Second: Where he is arrested after the offence has been committed.

1. It is a doctrine laid down by the oldest writers upon the common law, that all persons whatever, who are present when a felony is committed, or a dangerous wound is given, not only may apprehend the offender, but that it is their duty to do so.²

So, any person whatever, if an affray be made to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace.³

So, also, a private person may lawfully endeavor to prevent those whom he sees engaged in a riot or rout, from executing

¹ Mr. Livingston, Report of a Criminal Code.

² Randall's Case, 4 City H. Rec., 141; *Peo. v. Adler*, 3 Park., 253; 1 Arch. Cr. Pl., 21; 2 Hawk. P. C., 157; 1 East, P. C., 377, §1; *Holley v. Mix*, 3 Wend., 350; 1 Chit. Cr. L., 16, 17, 18.

³ 2 Inst., 52; Burn's Just., 92; *Phillips v. Trull*, 11 John., 436.

their purpose, and he may stop those whom he may see coming to join them, and may arrest those he sees engaged in it.¹

The right of a private person to arrest a person whom he sees in the actual commission of a felony, cannot be questioned; but when we come to consider the right of an unofficial person to arrest without warrant a person who is engaged in the commission of a mere misdemeanor, we do not find the authorities so well settled. Mr. Bishop, in his work on criminal procedure,² after a review of the cases bearing upon this subject, says: When the crime is of a lower grade than felony, and in one sense, the duty is a mere moral one, the reason of the thing would seem to be that the law will permit the person, if he is disposed to discharge this moral duty by interfering to prevent the commission of the crime, or to arrest the criminal, or both, yet the law might not allow this duty to be carried to all lengths. If the thing done was merely *malum prohibitum*, not being *malum in se*, or was of a nature not immediately disturbing the public repose, and not offending public morals, or the like, so injudicious would it be to make the arrest without a warrant by a private person, when no perceptible harm would come from the delay necessary to call in public authority, that the courts could hardly be expected to sanction such arrest. Indeed, it is very uncertain how far the courts would go in the midst of any facts standing on this shadowy ground of legal doubt.

The better doctrine seems to be that the permission extended to a private individual, to arrest without warrant, should be limited to cases of felony and affrays, or breach of the peace, while taking place.³

2. The question of the right of a private person to arrest without a warrant a party after the offence has been committed, depends in a great measure upon the fact whether the offence committed be a misdemeanor or a felony. The rule seems to be well settled, that no matter what may be the case of misdemeanor, there is no power in a private person to apprehend after the offence has been committed;⁴ for, in cases of misdemeanor,

¹ 1 Archer, Cr. Pl., 24; 1 Hawk., ch. 65, § 11.

² 1 Bish., Cr. Pro., § 628.

³ *Peo. v. Adler*, 3 Park., Cr. R., 253; *Phillips v. Trull*, 11 John., 486. *Peo. v. McArdle*, 1 Whee. Cr. Cases, 101; *Peo. v. Walven*, 7 N. Y., Leg. Obs., 89.

⁴ *Whar. on Homicide*, 75; *People v. Adler*, 3 Park., 254; 2 Hawk. P. C., 121; 11 John., 486; 2 C. & P., 585.

it is much better that the parties should apply to a magistrate for a warrant than to take the law into their own hands, which they are too apt to do.¹

A private person is not justified in arresting or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is a reasonable ground for apprehending that he intends to renew it.²

In cases of arrests by a private person, after a felony has been actually committed, two things must concur: 1st, a felony must have in fact been committed by some person; and 2d, such private person must have reasonable cause to believe the party arrested the guilty person.

(a) It is necessary that there should have been a felony actually committed. The honest suspicion of the commission of such a crime, will afford no protection to the party who makes the arrest;³ but if a felony has in fact been committed, and the private person has reasonable cause to suspect a particular person to be guilty of its commission, he may, acting in good faith, arrest such person, and he will not be liable either in a civil or criminal prosecution, should the suspicion prove unfounded.⁴

Chief Justice Savage states the rule thus: "My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the party arrested; but if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified, if he acted upon information which he had reason to rely on."⁵

The known commission of any offence less than felony will not

¹ Fox v. Gaunt, 3 B. & Ad., 798.

² 10 Clark & Fin., 28.

³ Holtum v. Lotun, 6 C. & P., 726; Lock v. Ashton, 12 Qu. Bench, 523; Breese, 18; 6 Term R., 315.

⁴ 1 Bish. Cr. Pro., 625; Holley v. Mix, 3 Wend., 350; 6 Binn., 316; Cald., 291.

⁵ Holley v. Mix, 3 Wend., 353.

authorize the arrest, for there is no distinction or degrees in misdemeanors for this purpose.¹

(b) In relation to the private person having reasonable cause to believe the party arrested the guilty person, the state of facts that will justify a reasonable belief that the party accused was guilty, must, of course, vary with the peculiar circumstances of each individual case. The suspicion ought always to be a reasonable one, founded on pregnant circumstances; mere suspicion will not suffice.² It has been held that a personal resemblance between the person arrested and the true offender, was not sufficient to justify the arrest.³ There should be such facts and circumstances as to warrant a cautious man in the belief that the party arrested was the real offender.⁴

Besides the authority given by the common law, the Revised Statutes also give private persons the right to apprehend and detain without warrant hawkers and pedlers without a license, and some other classes of offenders, which will be found more particularly spoken of in the subsequent chapter, concerning summary convictions before inferior magistrates.⁵

A deserter is not liable to arrest by any citizen without process and an order of the War Department, authorizing certain enumerated local magistrates and officers to arrest deserters, is to be construed strictly, and does not empower the deputies of such officers to make the arrest.⁶

SECTION II.

OF THE ARREST BY AN OFFICER WITHOUT A WARRANT.

The right of an officer to make an arrest without a warrant, like that of a private individual, is subject to the same general classification as to whether the party is apprehended in the actual commission of the offence, or the arrest is made after the offence

¹ *Fox v. Gaunt*, 3 Barn. & Adolph., 798.

² *Findley v. Pruitt*, 9 Porter, 195.

³ *Sugg v. Pool*, 2 Stew. & Port., 196.

⁴ 12 Pick., 324; 3 Ire., 289; 4 Wash. C. C., 82; 5 Bingham, 722; 25 Eng. L. & Eq., 55.

⁵ Post.

⁶ *Trask v. Payne*, 43 Barb., 569.

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has been perpetrated. The general rule may be laid down, that whenever the circumstances of the case would justify a private person in making an arrest without a warrant, they will equally justify a peace officer.¹ That subject has already been discussed in the preceding section

We have now to inquire in what additional cases an officer may make an arrest without a warrant.

(a) First, as to felonies: There is this distinction between a private person and an officer: In order to justify the former in causing the imprisonment of a person, as we have already seen, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has been actually committed: whereas, the officer having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.² The offence of petit larceny is within the above rule as to felonies.³

It has sometimes been contended that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our National and State Constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under both. But Justice Dewey says⁴ those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath, they do not conflict with the authority of constables or other peace officers, or private persons, under proper limitations to arrest, without warrant, those who have committed felonies. The public safety and the due apprehension of criminals charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested, and the arrest can only be justified by proving such guilt; but as to constables and other peace officers acting officially, the law clothes them with

¹ 2 Hawk, P. C., ch. 13, § 1.

² *Beckwith v. Philby*, 6 Barn. & Cress, 638, per. Lord Tentenden. Vide Doug., 360, et 2 Car. & P., 361.

³ *Carpenter v. Mills*, 29 How., 473; *Matter of Henry Id.*, 185.

⁴ *Rohan v. Spwin*, 5 Cush., 285. See also 6 Binney, 318, 1 N. H., 54.

greater authority, and they are held to be justified, if they act in making the arrest upon probable and reasonable grounds, for believing the party guilty of a felony; and this is all that is necessary for them to show, in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings under a complaint on oath and a warrant thereon.

A peace officer may, therefore, justify an arrest on a reasonable charge of felony without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot.¹ In the case of *Beckwith v. Philby*, cited above,² it was attempted by the plaintiff to make an essential distinction between the rights of an officer, whether he acts upon his own suspicion, or upon the charge and accusation of another. It was admitted that in the latter case, it was his duty to make the arrest, and it is not incumbent upon him to prove the felony. But it was claimed that if he assumed to act upon his own suspicion, he then placed himself in the situation of any private citizen, and could justify himself only on proof that a felony had in fact been committed; but any such distinction was entirely negatived by the court, and it was there broadly laid down that a constable, having a reasonable cause to suspect that a felony has been committed, has authority to arrest the party suspected, although it afterwards appear that no felony had been committed; and numerous decisions fully sustain this principle in its entire extent.³ It has sometimes been urged that the officer should not be allowed to arrest in such cases, only where there is reason to suppose that the party accused would otherwise escape;⁴ but in one of those cases the court said, we do not find any authority for thus restricting an officer in the exercise of his authority to arrest for a felony without a warrant. The probability of an escape or not, if the party is not forthwith arrested, ought to have its proper effect upon the mind of the officer in deciding whether he will arrest without a warrant; but it is not a matter upon which a jury is to pass, in deciding upon the right of the officer to arrest. The question of reasonable necessity for an immediate arrest, in order to prevent the escape of the party charged with felony, is

¹ *Samuel v. Payne*, 1 Doug. R., 359; 1 East., 301; 2 Hale P. C., 83, 84, 89.

² 6 Barn. & Cress., 635.

³ 1 Leading Crim. Cases, p. 161, note.

⁴ *Davis v. Russell*, 5 Bing., 359; *Rohan v. Sawin*, 5 Cush., 281.

one the officer must act upon under his official responsibility, and not a question to be reviewed elsewhere.¹

But in order to justify an officer in arresting without a warrant on suspicion of guilt of any crime, the crime supposed to have been committed must in law amount to a technical felony.²

(b) As to misdemeanors, we have already seen³ that a private person has no right to arrest a party without a warrant for the commission of a misdemeanor, after the offence has been perpetrated; but whether a peace officer is warranted in arresting a person after a breach of the peace has been committed, is a point which has occasioned some doubt. There are some authorities to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice to find security for his appearance;⁴ but the better opinion was always said to be the other way.⁵ In case of an affray where the same was in the view of the officer, he may arrest immediately afterwards; but in such case no delay whatever should be made in making the arrest;⁶ and an arrest two hours after an assault has been held illegal.⁷ In a note to the case of *Strong v. Blanchard*,⁸ cited above, it is stated that to justify the arrest, without a warrant, for a misdemeanor, the officer must have viewed the offence, unless to prevent a probable felony.

In *Rex v. Light*,⁹ the defendant was convicted on an indictment charging him with assaulting a constable in the execution of his duty. It appeared that the constable, while standing outside the defendant's house, saw him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him at the same time say: "If it was not for the policeman outside, I would split your head open." About twenty minutes after, the defendant left the house, saying that he would leave his house alto-

¹ 5 Cush. R., 281.

² *R. v. Thompson*, 1 Mood. C. C., 88, 132; 5 Exchr., 378; Russ & Ry. C. C., 329.

³ Ante.

⁴ 2 Hale P. C., 90; 1 East. P. C., 306, (n.)

⁵ Ros. Cr. Ev., 242; 1 East. P. C., 305; 2 Hawk. ch., 12, § 30; 1 Russ. by Grea., 601; 1 C. M. & R., 757; *R. v. Walker*, 1 Dears. C. C. R., 358; 2 Espinasse, 539; Cro. Eliz., 375; 4 C. & P., 387; 25 Eng. L. & Eq., 589.

⁶ *Strong v. Blanchard*, 3 Wend., 384.

⁷ *R. v. Walker*, supra.

⁸ 3 Wend., 384.

⁹ Dears. & B. C. C., 332.

gether, and he was then taken into custody by the policeman, who had no warrant. It was on this apprehension that the assault took place, and it was held that the policeman was justified in apprehending the defendant, and that the conviction was right.¹

(c) Independent of the above powers given by the common law to officers to arrest without warrant, our statutes make it the duty of peace officers to arrest various persons when required so to do by any person. Among this class of persons may be named beggars, vagrants and others, of whom more particular mention will be made hereafter, in treating of the summary conviction of offenders before magistrates.²

SECTION III.

OF THE ARREST BY OFFICERS WITH A WARRANT.

The following general rule may be laid down as applicable to this class of cases, viz.: If the magistrate has jurisdiction of the subject matter of the complaint, and the warrant be lawful and regular on its face, the officer is protected; for an arrest under it, though it be voidable for some error, irregularity or mistake, in some preliminary proceedings, and so if the want of jurisdiction be only as to the person or place, and that does not appear on the process; but if the magistrate has no jurisdiction of the subject matter then, every thing done is absolutely void, and the officer is a trespasser.³

In a leading case upon this subject in this State, and which has been followed in several subsequent cases, Marcy, J., said the following propositions, I am disposed to believe, will be found to be well sustained by reason and authority :

That where an inferior court has not jurisdiction of the subject matter, or having it, has not jurisdiction of the person of the defendant, all its proceedings are absolutely void. Neither the members of the court, nor the plaintiff (if he procured or assented

¹ 1 Ros. Cr. Ev., 242; vide, *Baynes v. Brewster*, 11 L. J. M. C., 5.

² Vide post.

³ 1 Lead. Cr. Cases, 180, note; Bull, *Nisi Prius*, 83; 10 Coke, 68; 2 Strange, 711-1002; 2 Wilson, 275-384; 2 Florida, 171; 11 Conn., 95; 4 Id., 107.

to the proceedings), can derive any protection from them, when prosecuted by a party aggrieved thereby.

If a mere ministerial officer executes any process, upon the face of which it appears, that the court which issued it had not jurisdiction of the subject matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.¹

It being the rule that the officer must decide at his peril, whether the court had general jurisdiction over the subject matter, and that in order to decide this question, he may be governed by knowledge or evidence, obtained *aliunde* from his precept. It is equally true that if the want of jurisdiction be only as to the person, place or process, such want of jurisdiction must appear on the process, or the officer is shielded by its protection.² A ministerial officer is protected in the execution of process, regular and legal on its face, though he has knowledge of facts rendering it void for want of jurisdiction.³

And a warrant, which is a protection to the officer, is also a protection of those who come to his aid.⁴

A warrant for the arrest of a criminal offender, issued under 2 Revised Statutes, 706, under which he has been arrested, and has been discharged on giving recognizance, cannot authorize a second arrest, though the recognizance is void. The warrant is spent by the first arrest.⁵

So, also, an arrest is illegal when made by a constable of one county, upon the undorsed warrant of a justice of the peace in another county.⁶

Besides the warrants issued for the apprehension of offenders by certain magistrates and other officers, as specified in subsequent chapters of this volume, the Boards of Health, created by acts of the Legislature, have power to issue warrants in certain cases.⁷

¹ *Savacool v. Boughton*, 5 Wend., 171; 12 Wend., 496, 6 Id., 367; 2 Com., 473; 3 Barb., 19.

² 1 Lead Cr. Cas., 182, note; 5 Wend., 170; 12 Vermont, 661; 1 Gilman, 201; 1 Richardson, 147.

³ *Wright v. Warren*, 5 Hill, 440, 9 Conn., 140; 24 Wend., 485.

⁴ *Doolittle v. Doolittle*, 31 Barb., 312.

⁵ *Wright v. Russell*, 30 Barb., 300; disapproving, 6 Hill, 349.

⁶ *Wright v. Shafer*, 4 Park., 45.

⁷ Laws of 1850, ch. 324; Laws 1866, ch. 74, § 14.

And so, also, may inspectors of election¹ and other special officers in the different cases pointed out by statute, issue warrants of arrest in particular instances, falling within those provisions of the statute.

SECTION IV.

AS TO THE TIME AND MANNER OF MAKING THE ARREST.

Having already spoken of the power of official and unofficial persons to make arrests, we will now consider the time and manner in which the arrest is to be made.

(a) As regards the time, the rule was laid down by the common law, that in cases where a party was authorized to arrest without a warrant, that it could be made at any time, even on a Sunday, and at any place,² and that it might be made in the night as well as the day time, in order to prevent the escape of the party.³ Our statute provides in cases of breach of the peace, or apprehended breach of the peace, or for the apprehension of persons charged with crimes and misdemeanors, that process and warrants may be served upon Sunday.⁴

(b) An officer making an arrest with a warrant, should give some notification of his authority as such officer. The books agree that the officer is bound to give the substance of the warrant or process, to the end that the party may know for what cause he is arrested, and take the proper legal measures to discharge himself. This is, however, where the party submits to the arrest, and not where he makes resistance before the officer has time to give the information, although the officer is not bound to exhibit the warrant, especially where there may be reason to apprehend that it may be lost or destroyed, yet it cannot be doubted that it is his duty to inform the party where such is the fact, that he has a warrant, or to make known in some other way that he comes in his character as an officer, to execute legal process, and not leave the party to suppose that he is assailed by a wrong-doer. The contrary doctrine would be likely to lead to

¹ 1 R. S., 349, § 33.

² 1 Arch. Cr. Pl., § 28, h.; Smythe, 207; 1 Nun. & Walsh, 102.

³ 9 Co., 66; 1 Chit. Cr. L., 49; 1 East. P. C., 324; ³Tarent, 14; 5 Bing. 354.

⁴ 1 R. S., 675, § 65.

violence and bloodshed. BRONSON, Justice, says: "I do not say that the officer is bound to declare the particulars of his authority before he makes the arrest, or that it may not sometimes be proper to lay hands on a party before a word is spoken, but either before or at the moment of the arrest, the officer ought to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice."¹

It is said that an officer, if a known public officer, is not bound to show his warrant for the arrest, even if demanded by the defendant,² but that the case was different with a special deputy, for he was bound to show his warrant, or the arrest is illegal.³

MR. BENNETT, in his Notes to Leading Criminal Cases,⁴ says, it may be fairly questioned whether the authorities upon this subject mean more than a general officer is not bound to show his warrant of appointment; for it is difficult to see why a general officer is not as much bound to show the precept authorizing him to arrest a person, if the same be demanded, as a special officer; and Lord KENYON remarked, that he did not think a person bound to take it for granted, that another, who says he has a warrant against him, without producing it, speaks the truth; and he considered it very important that in all cases where an arrest was made by virtue of a warrant, the warrant if demanded, should be produced, so as to leave a delinquent no excuse for resistance.⁵

(c) There are some cases which tend to show that submission to process without compulsion is no arrest or imprisonment; but the law must be understood as well settled that no manual touching the body, or actual force, is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer, and submits to the arrest.⁶

With respect to hand-cuffing, the law undoubtedly is, that police officers are not only justified, but are bound to take all reasonable requisite measures for preventing the escape of those

¹ *Bellows v. Shannon*, 2 Hill, 86; 6 Co., 54-5; 9 Co., 69; 13 Mass., 321; *Fost. Cr. L.*, 310-11; 1 Russ. on Cr., 451-514; 10 Wend., 516.

² *Arnold v. Steeves*, 10 Wend., 514; 3 Hawk. P. C., b. 2, ch. 13, § 28; 2 Hale's P. C., 116; 1 Haywood, 471.

³ *Frost v. Thomas*, 24 Wend., 418; 2 Iredell, 201.

⁴ Vol. 1, p. 185.

⁵ 8 T. R., 188; 1 Chit. Cr. L., 51; 1 T. R., 118.

⁶ *Gold v. Bissell*, 1 Wend., 215.

persons they have in custody, for the purpose of taking them before the magistrate ; but what those reasonable measures are, must depend entirely upon the circumstances, upon the temper and conduct of the person in custody, or the nature of the charge, and a variety of other circumstances, which must present themselves to the mind of any one. As to supposing that there is any general rule that prisoners are to be handcuffed, seems to be an unjustifiable view of the law.¹

(d) In relation to commanding assistance by the officer, it is provided, that whenever a sheriff or other public officer, authorized to execute any process delivered to him, shall find or have reason to apprehend that resistance will be made to the execution of such process, he shall be authorized to command every male inhabitant of his county, or as many as he shall think proper, and with such arms as he shall direct, and any military company or companies in said county, armed and equipped, to assist him in overcoming such resistance, in seizing, arresting and confining the resisters, their aiders and abettors, to be dealt with according to law.² And persons who are commanded by officers to assist them in the execution of process, and who refuse, or without lawful cause neglect to obey such command, are subject to fine and imprisonment.³

(e) In regard to the right to break open doors and windows to make an arrest, it is said in general that a man's house is regarded as his castle, which is only to be violated when absolute necessity compels the disregard of smaller rights in order to secure public benefit ; and, therefore, in all cases where the law is silent, and express principles do not apply, this extreme violence is illegal.⁴ In all cases where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties can proceed to that extremity ;⁵ but where a party arrested by an officer breaks away, and shuts himself up in his own house, the officer is justifiable in the attempt to retake

¹ Leigh v. Cole, 6 Cox C. C., 331.

² 2 R. S., 441, § 101.

³ Idem, § 103. Vide 10 Wend., 128.

⁴ 1 Arch. Cr. Pl., 29, note; 3 Black. Com., 288; 14 East., 79, 116, 118, 154-5; 5 Co., 91; Cowp., 1.

⁵ 1 Russ. on Cr., 627, 628; Fost, 320; 2 Hawk. P. C., ch. 14, § 1. 1 East. P. C., ch. 5, § 87.

him to break open the outer door of the house of such party without making known his business, demanding admission, and receiving a refusal, where the pursuit is fresh, and the party consequently aware of the object of the officer.¹

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him, and the doors may be forced after such notification, demand and refusal, as above stated.² So, also, when a minister of justice comes armed with process founded on a breach of the peace, doors may be broken.³ But, though a felony has been actually committed, yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion;⁴ for, where a person lies under a probable suspicion only, it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified, or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty.⁵

It is said that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace and prevent the danger; and it is also said that if there be disorderly drinking or noise in a house, at an unseasonable time of night, especially in inns, taverns or ale houses, the officer demanding entrance and being refused, may break open the doors to see and suppress the disorder; and further, that where an affray is made in a house in the view or hearing of the officer, or where those who have made an affray in his presence fly to a house and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first instance, or to apprehend the affrayers in either case, he may justify breaking open the doors.⁶

The privilege above spoken of, viz., of every man's house

¹ *Allen v. Martin*, 10 Wend., 301.

² *Russ on Cr.*, 628; *Fost.*, 320; 1 *Hale*, 459; 2 *Hawk. P. C.*, ch. 14, § 7.

³ *Idem.*

⁴ *Fost.*, 321.

⁵ 1 *Russ on Cr.*, 629; 2 *Hawk. P. C.*, ch. 5, § 87; 1 *East. P. C.*, ch. 5, § 87.

⁶ *Russ on Cr.*, 629; 2 *Hale*, 95; 2 *Hawk. P. C.*, ch. 14, § 8.

being his castle, applies only to the breach of outward doors, so if the officer found the outward door open, or it be opened to him from within, he may then break any inward door, if he find that necessary in order to execute his process;¹ and the privilege only extends to the dwelling house, but it should seem that within that term are comprehended all such buildings as are within the curtilage, and as are considered as part of the dwelling house at common law.² So, also, this personal privilege of an individual, in respect to his outer door or window, is confined to cases where the breach of the house is made in order to arrest the occupier or any of his family who have their domicile, their ordinary residence, there; for, if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary.³ And also, as above stated, it must be confined to arrests in the first instance; for if a man, being legally arrested, escape from the officer, taking shelter in his own house, the officer may, upon fresh suit, break open the doors without the notice, demand of admission and refusal spoken of.⁴

(f) As to the amount of force to be used by the officer in making the arrest, the officer should in all cases act with caution and prudence; but he is authorized to use as much force as may be necessary, according to the circumstances of the case, to overcome resistance and effect the arrest;⁵ and if the officer or other person, in endeavoring to make a legal arrest, be resisted, and in opposing force to force he happen to kill the party, the homicide is justifiable, and the officer or other person need not retreat, as in the ordinary case of *se defendo*; but if the arrest would have been illegal, the killing would amount to manslaughter.⁶

(g) In relation to the power of an officer to convey a prisoner through other counties, it is provided by statute, that when an officer shall have arrested any prisoner on a criminal charge in any county, he may carry such prisoner through such parts of

¹ 1 Russ. on Cr., 630; 1 Hale, 458; 1 East. P. C., ch. 5, § 87.

² 1 Russ. on Cr. 631.

³ Fost., 320; 5 Co., 93; 1 Russ. on Cr., 631.

⁴ 1 Russ. on Cr., 632; Fost., 320; 1 Salk., 79; 1 Hale, 459; 2 Hawk. P. C., ch. 14, § 9; 10 Wend., 301.

⁵ 1 Hale, 494; Fost., 270.

⁶ 1 Arch. Cr. Pl., 29; 1 Hale, 494, 481; Fost., 318, 274; 2 Hale, 218.

any other county or counties as shall be in the ordinary route of travel, from the place where such prisoner shall have been arrested, to the place where he is to be conveyed, and delivered under the process by which such arrest shall have been made, and such conveyance is not deemed an escape.¹

And while passing through such other county or counties, the officers having such prisoner in their charge, are not liable to arrest on civil process, and they have the like power to require any citizen to aid in securing such prisoner, and to retake him if he escape, as if they were in their own county; and a refusal or neglect to render such aid, is an offence in the same manner as if they were officers of the county, where such aid was required.²

(h) In regard to escapes by the prisoner, where it is without the assent of the officer, the prisoner may be retaken as often as he flies upon fresh suit, though he were out of view or had reached another county or district.³ In a case in this State where the escape was voluntary upon the part of the officer, Justice Cowen stated that it is said in some books, that in case of criminal process, the officer suffering the escape, cannot take the accused. The question is not settled, but I am inclined to think the law is otherwise, and so it is considered in those books which treat the subject with the greatest care. The people ought not to be deprived of any right, by an escape of whatever kind from custody, under criminal process, though the officer consent to the escape, he is bound to retake the prisoner.⁴

It has, however, been held in this State, that where a prisoner has been arrested in one county, upon an indorsed warrant issued by a justice of the peace in another county, and the prisoner is discharged from arrest by a justice of the peace of the county in which he is arrested, on entering into a recognizance before him, that although such justice may not have had the right to take such bail, and the prisoner should have been brought back to the county from which the warrant issued, yet the warrant has spent itself, and the officer has no right to arrest the prisoner again without new process.⁵

¹ 2 R. S., 748, § 53.

² Id., § 54.

³ 1 Chit. Cr. L., 59; Dick. J., arrest, 111.

⁴ Clark v. Cleveland, 6 Hill, 349; 2 Hawk., ch. 19, § 12; 1 Esp. R., 218; Peak N. P. Cases, 234; Chit. Cr. L., 61., Ed. of 1841; 1 Gow. N. P. Cases, 99.

⁵ Doyle v. Russell, 30 Barb., 300; disapproving 6 Hill, 349.

(i) Concerning the force which may be used to prevent and in pursuit of an escaped prisoner, it is laid down that where a felony has been actually committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot be otherwise overtaken, and the same rule holds if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake him without killing him ; but if he may be taken in any case without such severity, it is at least manslaughter in him who kills him, and the jury ought to inquire whether it were done of necessity or not, and it is no defense to an officer in such a case, to show that he had reasonable ground to believe that the deceased had been guilty of a felony, and that he had also reasonable ground to believe that the deceased would otherwise accomplish an escape.¹

But where the party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise overtake him;² and although the officer must not kill for an escape where the party is in custody for a misdemeanor, yet if the party assault the officer, with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party.³

SECTION V.

OF FUGITIVES FROM JUSTICE, AND THE OBTAINING OF REQUISITIONS FOR THE ARREST THEREOF UPON THE GOVERNORS OF OTHER STATES.

A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.⁴

In pursuance of the power vested in the executive authority of the State of New York, for the demand for arrest in other

¹ *Conrodty v Peo.*, 5 Park., 234 ; *Whar. on Homicide*, 50 ; 1 Hale, 481 ; *Fost.*, 27 ; 1 Russ. on Cr., 533 ; 2 Dev., 58.

² *Whar. on Hom.*, 51.

³ *Idem*, 53.

⁴ Constitution of the United States, art. 4, § 2.

States of persons committing crimes within this State, and escaping therefrom before arrest, and the delivery up and removal thereof from another State to this State for trial, the Executive Department of the State of New York have issued printed regulations, calling the attention of district attorneys, sheriffs and county clerks to the requirements embraced therein.

The regulations state, that to avoid the frequent irregularities and defects in applications to the Governor for requisitions on the Governors of other States for the surrender of fugitives from justice, rules have been adopted by the Executive Department, and will be strictly enforced ; and any application not complying with them in all respects, will be rejected without inquiry into its intrinsic merits.

The following is a synopsis of the rules and regulations above referred to :

Applications for requisitions must in all cases be made by the district attorney, or in his absence, by his deputy, who must certify that he approves of the application ; that the party complained of is a fugitive from justice, and is, he believes, at the time in the State of ——— ; that he fled from this State before arrest could be made, and that the ends of justice require that he should be brought back to this State for trial.

If the application is upon an indictment, a certified copy thereof must be furnished by the clerk of the court in which it was found.

If upon affidavits, the magistrate taking them must certify that, in his opinion, the parties making them are to be believed, and that they present a proper case for a requisition ; and the official character of the magistrate must be proved.

The district attorney must further certify that if the facts stated in the affidavits are true, they would, in his opinion, result in a conviction.

It must also be affirmatively stated whether any application for a requisition for the same person, for an offence arising out of the same transaction, has been previously made ; and if a prior application has been made, any new facts appearing in the papers must be specially pointed out.

The district attorney must also name the State upon which the requisition is asked, and a proper person to whom the warrant

is to issue ; and must certify that such person has no private interest in the arrest of the fugitive.

When any statements are made upon information and belief, the statements so made must be distinctly defined, and the sources of information and grounds of belief must be set forth in detail.

In all cases the greatest care will be exercised in the department to ascertain beyond a doubt that the object in seeking a requisition is not to collect a debt, or to afford some person an opportunity to travel at the public expense, or to answer some other private end. In all cases of false pretences, embezzlement, conspiracy and similar crimes, the strongest affirmative evidence will be required that the real object is not the collection of a private debt.

If a requisition shall have been improperly or unadvisedly granted, there will be no hesitation in revoking it.

If the offence is not of recent occurrence, sufficient reasons must be given why the application has been delayed.

If known, it should also be stated whether the accused has ever been a resident of this State, or has been only transiently here.

In all cases of rejected applications for requisitions, the papers will be retained in the Executive Department.

Requisitions will, as a general thing, be granted only upon the express condition inserted in the warrant, that no portion of the expense shall fall upon the State, but that the entire expense shall be borne by the county from which the application comes. District attorneys will therefore remember that in making an application for a requisition, they are sanctioning a county charge. This rule will be waived only in extraordinary cases, though the expense may sometimes be imposed on the complainant or applicant.

Duplicates of all papers necessary upon the application must be furnished, that one set may be retained in the Executive Department, and the other attached to the requisition, though only one set need be certified. This requirement is designed to embrace the formal application or letter of the district attorney.

In no case can a requisition be granted at the same time for the same offender, upon the Governor of more than a single State.

It must also be shown by affidavit, duly verified, that the party

complained of is a fugitive from justice, and that according to the best knowledge and belief of the affiant, the alleged fugitive is at the time of making the application in the State, upon which a requisition is asked, and the grounds for such belief must be specifically set forth in such affidavit.

It having been decided in the Third Judicial District that Notaries Public are not magistrates within the meaning of the federal law, no application for a requisition based upon affidavits before a notary public will be granted.

The Governor has no power to require the surrender of fugitives who have taken refuge in the British province.

When the Governor of this State, in the exercise of the authority conferred by the Constitution of the United States, or by the laws of this State, shall demand from the Governor of any State or territory in the United States, or from the executive authority of any foreign government, any fugitive from justice, the account of the persons employed by him for that purpose, for their services, shall be audited by the Comptroller and paid out of the treasury.¹

The Legislature generally include in the act passed each year making appropriations for the support of the State government a stated sum for the apprehension of criminals.

The Governor, in estimating the expense of the arrest of fugitives from justice, generally has reference to this appropriation, and, except in extraordinary cases, inserts a clause in the body of the requisition, that no part of the expense thereof shall fall upon, or be borne by the State.

In such cases the officer performing the travel and executing the warrant, has to seek his recompense either from the party who employed him, or from the Supervisors of the county in which the District-Attorney resides, who signed the application for the requisition.

Upon an examination of the application for the requisition and papers thereto attached, if they present a proper case, the Governor of this State certifies to the Governor or Chief Magistrate of the State or territory where the fugitive may be, that the papers are authentic, and certified in accordance with the law of this State, and requires therein that the fugitive be appre-

¹ 2 R. S., 748, § 52.

handed and delivered to the person named in the requisition, and therein authorized to receive and convey the fugitive to this State, to be dealt with according to law. One set of the papers furnished upon the application, is attached to the requisition, and the same is signed by the Governor, attested by his private secretary, and sealed with the privy seal of the State. There is also generally delivered by the Governor to the person named in the requisition, at the same time, another paper sealed, signed and attested in the same manner as the requisition, authorizing such person to receive the fugitives from the proper authorities of the State or territory, upon which the requisition is drawn, and to bring him to this State, to be dealt with according to law. It is also the practice for the officer or person serving the requisition, and named in it, to take with him, if the fugitive be indicted, a bench warrant, and if not indicted, a warrant from the magistrate, before whom the complaint was made, for the arrest of the accused.

The subsequent proceedings in relation to the arrest of the accused, and the power of the officer or person named in such requisition, and acting thereunder in another State, and the duty of the Governor or Chief Magistrate of such other State or territory are regulated by act of Congress.¹

¹ U. S. Laws, February 12, 1793, § 2.

CHAPTER V.

OF SURETIES OF THE PEACE.

GENERAL REMARKS.

Section I.—OFFICERS WHO MAY REQUIRE SURETY OF THE PEACE.

II.—OF THE COMPLAINT.

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It has been said by a learned commentator, to be really an honor, and almost a singular one, that English laws furnished a title of the means of preventing offences, since preventative justice is upon every principle of reason, of humanity and of sound policy, preferable in all respects to punishing justice, the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended by many harsh and disagreeable circumstances.¹

This preventative justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior to stipulate with, and to give full assurance to the public, that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace or for their good behavior.²

SECTION I.

OFFICERS WHO MAY REQUIRE SURETY OF THE PEACE.

The following officers shall have power to cause to be kept all laws made for the preservation of the public peace, and in the execution of that power, to require persons to give security to

¹ 4 Blac. Com., 252.

² Idem.

keep the peace in the manner hereinafter provided, namely: Justices of the Supreme Court, Judges of the Superior Court of Law of the city and county of New York, the Justices of the Justices' Courts, and Police Justices for the said city, and County Judges of County Courts, Mayors, Recorders and Aldermen of cities, Police Justices and Justices of the Peace, appointed for any city or elected in any town.¹

SECTION II.

OF THE COMPLAINT.

Whenever complaint shall be made in writing and upon oath to any such magistrate, that any person has threatened to commit any offence against the person or property of another, it is the duty of such magistrate to examine such complainant, and any witnesses who may be produced on oath, to reduce such examination to writing, and cause the same to be subscribed by the parties so examined.² The complaint should be filed and preserved by the justice, and any party affected by the warrant allowed to peruse the same, and take a copy thereof in person or by deputy.³

On an application to a magistrate for sureties of the peace, there must be a formal complaint in writing, and upon oath, besides the examination in writing required by the statute, to justify the magistrate in issuing a warrant against the party complained of, it is not enough that the complaint is embraced in the examination.⁴

It is a universal principle of law, admitting of no exception, that a man cannot be deprived of a known right without a specific accusation, and even where mere surety of the peace, or of good behavior is demanded, the party requiring it must not only state his fears but assign the cause upon which those fears are grounded. The rule is laid down with great precision by Hawkins and Sir William Blackstone. It is this, that whenever a person has just cause to fear that another will burn his house or do him a corporal hurt, as by killing or beating him, or that he

¹ 2 R. S., 704, § 1.

² 2 R. S., 704, § 2.

³ Laws 1866, ch. 95.

⁴ *Bradstreet v. Ferguson*, 23 Wend., 638.

will procure others to do him such mischief, he may demand surety of the peace against such person ; and every justice of the peace is bound to grant it upon the parties giving him satisfaction, upon oath, that he is actually under such fear, and that he had just cause to be so by reason of the other's having threatened to beat him, or lain in wait for that purpose ; and that he does not require it out of malice or vexation.¹

SECTION III.

WHEN WARRANT TO ISSUE.

If it shall appear from such examination that there is just reason to fear the commission of any such offence by the person complained of, it is the duty of the magistrate to issue a warrant under his hand, with or without seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate.²

If the warrant to arrest recite that there was a complaint in writing, and upon oath, it is *prima facie* evidence that such proceedings were had, and will protect the magistrate in an action against him, until it be affirmatively shown on the other side that there was not such a complaint.³

SECTION IV.

PERSON ARRESTED TO ENTER INTO A RECOGNIZANCE.

Upon such person being brought before the magistrate, he may be required to enter into a recognizance in such sum, not exceeding one thousand dollars, as such magistrate shall direct, with one or more sufficient sureties, to appear at the next Court of Sessions, to be held in such county, and not to depart the same without leave ; and in the meanwhile to keep the peace towards the people of this State, and particularly towards the person requiring such security.⁴ There is no examination or

¹ 1 Wh. Cr. Cases, 315.

² 2 R. S., 704, § 3. Vide 5 Park., 651.

³ 23 Wend., 638.

⁴ 2 R. S., 704, § 4.

trial of the party arrested upon the return of the warrant, and he is not permitted to be heard either personally or by counsel at this stage of the proceedings, he must either enter into the recognizance, when he will be discharged, or in default thereof, it becomes the duty of the justice to commit him, as in the next section specified.

SECTION V.

WHEN PARTY DISCHARGED, AND WHEN TO BE COMMITTED.

If such recognizance shall be given, the party complained of is to be discharged. If such person shall refuse to find such security, it becomes the duty of the magistrate to commit him to prison until he shall find the same, specifying in the warrant the cause of commitment, and the sum in which such security was required; and any person committed for not finding sureties of the peace, as above provided, may be discharged by any two justices of the peace of the county, upon giving such security as was originally required of such person.¹

In the *mitimus*, it is not necessary to state the crime for the prevention of which the application for sureties of the peace was made; it is enough if it be stated that the party is committed for refusing to give sureties.²

When a justice of the peace, after an examination, has adjudicated that a person brought before him shall give sureties to keep the peace, and the prisoner has refused to do so, it is his duty to issue his warrant of commitment; and such warrant issued on the next day will be valid, though in the meantime the prisoner has been suffered to go at large by the consent of the justice.³

The warrant of commitment is valid without a seal.⁴

¹ 2 R. S., 704, §§ 5, 6.

² 23 Wend., 638.

³ *Gano v. Hall*, 5 Park., 651.

⁴ *Idem*.

SECTION VI.

RECOGNIZANCE TO BE FILED.

Every recognizance taken pursuant to the foregoing provisions, is to be transmitted by the magistrate taking the same to the next Court of Sessions of the county.¹

SECTION VII.

WHEN SURETIES MAY BE REQUIRED WITHOUT COMPLAINT.

Every person who in the presence of any magistrate above specified, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offence against his person or property, and all persons who in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of refusal so to do, may be committed in like manner as above provided.²

SECTION VIII.

PROCEEDINGS ON THE RECOGNIZANCE.

Every person who shall have entered into a recognizance to keep the peace, shall appear at the next Court of Sessions held in the county, and if he fail to appear, the court shall forfeit his recognizance, and order it prosecuted, unless reasonable excuse for his default be given. If the complainant do not appear, the party recognized shall be discharged, unless good cause be shown to the contrary, and if the respective parties appear, the court shall hear their proofs and allegations, and may either discharge the cognizance taken, or they may require a new recognizance, as the circumstances of the case may require, for such time as shall appear necessary, not exceeding one year.³

¹ 2 R. S., 704, § 7.

² 2 R. S., 705, § 8.

³ 2 R. S., 706, §§ 9, 10.

SECTION IX.

WHEN RECOGNIZANCE DEEMED BROKEN.

No recognizance to keep the peace shall be deemed to be broken, except in the case provided for by the last section, unless the principal in such recognizance be convicted of some offence amounting in judgment of law to a breach of such recognizance.¹

SECTION X.

ACTION UPON RECOGNIZANCE.

Whenever the district attorney of the county in which such recognizance was taken, shall produce to the court in which such recognizance was filed, evidence of such conviction, it becomes the duty of such court to order the recognizance to be prosecuted, and the district attorney is thereupon to commence an action in the name of the people of this State, and in such action the offence stated in the record of conviction shall be assigned as a breach of the condition of such recognizance, and such record shall be conclusive evidence of the matters therein stated.²

SECTION XI.

COMMON LAW AUTHORITY ABROGATED.

No security to keep the peace or to be of good behavior, shall be required, nor shall any person be committed to prison for not giving the same in any case, except such as are prescribed or authorized by statute.³

SECTION XII.

SURETIES FOR GOOD BEHAVIOR.

Recognizances for good behavior are demandable or not in the discretion of the judge. They differ from recognizances to keep

¹ 2 R. S., 705, § 11.

² 2 R. S., 705, §§ 12, 13.

³ 2 R. S., 705, § 14.

the peace in two important features. First: Surety for good behavior is more extensive in its nature than surety of the peace, and may be more easily forfeited, and therefore should be exacted with greater caution. Second: Surety of the peace is demandable of right by any individual who thinks himself in danger of bodily hurt, and will make the necessary oaths; but this principle has not been applied to surety for good behavior.¹

SECTION XIII.

SURETY OF THE PEACE BY CONVICTS.

Every court of criminal jurisdiction, before which any person shall be convicted of any criminal offence, not punishable with death or imprisonment in a State prison, shall have power, in addition to such sentence as may be prescribed or authorized by law, to require such person to give security to keep the peace, or to be of good behavior, or both, for any term not exceeding two years, or to stand committed until such security be given. But the above provision does not extend to any conviction for writing or publishing any libel, nor can any such security be required by any court upon any complaint, prosecution or conviction for such writing or publishing.²

No recognizance given under the last section shall be deemed to be broken, unless the principal therein be convicted of some offence amounting in judgment of law to a breach of such recognizance. The same proceedings for the conviction of such recognizance, when forfeited shall be had, as are prescribed by statute, and above mentioned in relation to recognizances to keep the peace.³

SECTION XIV.

BY PRIZE FIGHTERS.

Whenever it shall be made to appear to any magistrate, having power to hear complaints in criminal cases, that there is reasonable ground to apprehend that an offence, within the statute

¹ Com. v. Duane, 2 Whee. Cr. Cases, 540.

² 2 R. S., 738, § 1.

³ Id., §§ 2, 3.

against prize fighting, is about to be committed, such magistrate shall issue his warrant to the sheriff or constable in the county of such magistrate's residence, for the arrest of the person or persons so about to offend, and upon such person being brought before him, shall inquire into the matter, and if it shall appear that there is reasonable ground to apprehend that such person was about to commit any offence specified in the provisions against prize fighting, he shall require such person to enter into a bond to the people of the State of New York, in such sum, not exceeding one thousand dollars, as such magistrate shall fix, that such person will not, for the space of one year, offend against any of the provisions of said act; and such bond may, in the discretion of the magistrate, be required to be with sureties, to be approved of by such magistrate, or may be taken without surety.¹

If any person shall omit or refuse to enter into such bond, the magistrate shall commit such person to the county jail, there to remain until discharged by a Court of Record having criminal jurisdiction. Any person so committed to the county jail may at any time, upon habeas corpus, be discharged from his imprisonment, by executing the bond directed by the committing magistrate; and if such bond was required to be with surety, the officer taking the same shall approve of the surety.²

SECTION XV.

SPECIAL PROVISIONS APPLICABLE TO CITY AND COUNTY OF NEW YORK.

Every recognizance to keep the peace, or to be of good behavior, or both (except such recognizances for good behavior as shall be taken on conviction of disorderly persons, and such recognizances to keep the peace as shall be made returnable to the Court of General Sessions of the Peace), that shall be entered into in the city and county of New York, shall be forthwith filed in the office of the clerk of the Court of Special Sessions in said county; and whenever it shall appear that any such recognizance has been violated, it becomes the duty of the district attorney in said county to move, before the said Court of Special Sessions,

¹ Laws 1859, ch. 37, § 2, p. 63.

² Id., §§ 2, 3.

for the forfeiture of the recognizance. The said Court of Special Sessions may, upon the proof of the violation of any such recognizance, direct the same to be forfeited, by an order entered in their minutes; and the clerk of said court shall return the said recognizance, when forfeited, with a certified copy of the minutes of forfeiture to the district attorney, that it may be prosecuted. Any act or behavior upon the part of the principal in such recognizance, which would have been cause for an order to find surety for good behavior or to keep the peace in the first recognizance, is to be deemed a breach of such recognizance.¹

Whenever complaint on oath and in writing shall be made before one of the police justices in the city of New York, that any person has committed a breach of the condition of his recognizance, the said justice may issue his warrant for the arrest of said person so complained of; and upon said person being brought before him, the said justice shall proceed in the same manner, as far as practicable, as is prescribed by law for the prosecution, examination, discharge, committal or bailing of persons charged with misdemeanors before police justices in said city. In case the person so complained of, cannot be found within thirty days, it becomes the duty of said police justice to return said complaint to the Court of Special Sessions, in the same manner as complaints for misdemeanors are returned, with his certificate of the fact.²

The subsequent proceedings upon such recognizances, in the Court of Special Sessions, will be found pointed out in chapter 508, of the Laws of 1860.³

¹ Laws 1860, ch. 508, § 1, p. 1007.

² Laws 1860, ch. 508, § 7, p. 1007.

³ Laws 1860, p. 1007.

CHAPTER VI.

SEARCH WARRANTS AND THE SEARCHING OF PRISONERS FOR PROPERTY.

GENERAL REMARKS.

Section I.—OF SEARCH WARRANTS FOR CHILDREN DETAINED BY SHAKERS.

II.—OF SEARCH WARRANTS TO COMPEL THE DELIVERY OF BOOKS AND PAPERS BY PUBLIC OFFICERS TO THEIR SUCCESSORS.

III.—OF SEARCH WARRANTS ISSUED FOR STOLEN OR EMBEZZLED PROPERTY.

IV.—OF THE WARRANT.

V.—WARRANT, TO WHOM DIRECTED, &c.

VI.—SEARCH IN THE NIGHT TIME.

VII.—BY WHOM TO BE EXECUTED.

VIII.—WARRANT, HOW EXECUTED.

IX.—SEARCH WARRANT FOR MINERAL WATER BOTTLES.

X.—SEARCHING PRISONERS, &c., FOR PROPERTY.

XI.—OF THE DISPOSITION MADE OF STOLEN PROPERTY.

XII.—SEARCH WARRANTS FOR PROPERTY PAWNED.

XIII.—SEARCH WARRANTS FOR CANAL PROPERTY.

THE Constitution of the United States declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

The same article is also incorporated into the bill of rights of this State.²

In former times, search warrants were contrary to law, and it was remarked by Lord CAMDEN, that they had crept into the law by imperceptible practice, but Lord HALE clearly establishes their legality, on the ground that without them felons would frequently escape detection.³

The provisions of our statutes regulating search warrants, and the cases in which they may issue, will be found specified below. The cases in which they are most frequently issued, are those for the recovery of personal property that has been stolen or embezzled.

¹ Const. U. S., art. 4, amendments.

² § 11.

³ Arch. Cr. Pr., 1, § 35, note a; 4 Inst., 176; 11 St. Tr. 321; Hawk. B., 2 ch. 13, § 17, n. 6; 2 Hale, 113; 1 D. & R., 97; Burn, J. et Williams, J., Search Warrant; Dick, J., Warrant, I.

SECTION I.

OF SEARCH WARRANTS FOR CHILDREN DETAINED BY SHAKERS

The provisions of the Revised Statutes in relation to *corpus* for children detained by Shakers, enact that if upon return of any *habeas corpus* so issued, it shall appear that the child therein mentioned cannot be found, and satisfactory proof made to the officer issuing the writ that such child is secretly concealed by or among any society of Shakers in this State, he may issue his warrant, directed to the sheriff of the county in which the said child is suspected to be, commanding such sheriff at any day or time to search the dwelling houses and other buildings of such society, or of any members thereof, or any other building or dwelling house specified in the warrant, for such child, and bring him before such officer, and the sheriff shall forthwith execute such warrant.¹

When such child is brought before such officer, he may commit the charge and custody thereof to that parent who shall not be a member of the society of Shakers, for such time, under such conditions, and with such provisions and directions as he shall think proper; and every such order may at any time on sufficient cause shown, be annulled, varied or modified by the officer who made the same, or in case of his being absent, or not exercising the duties of such office, then by any other officer who might lawfully have made such order.²

SECTION II.

OF SEARCH WARRANTS TO COMPEL THE DELIVERY OF BOOKS AND PAPERS BY PUBLIC OFFICERS TO THEIR SUCCESSORS.

In proceedings had to compel persons who have been removed from office, or where the term for which they shall have been elected or appointed shall expire, to deliver up to their successors all books and papers in their custody as such officers or persons appertaining to their office; and the person complained of shall not make the oath required by the statute, and in

¹ 2 R. S., 149, § 5.

² Id., § 6.

appear that any such books or papers are withheld, the officer before whom such proceeding shall be had, shall also issue his warrant, directed to any sheriff or constable, commanding them in the day time to search such places as shall be designated in such warrant, for such books and papers as belonged to the officer so removed, or whose term of office expired in his official capacity, and which, appertained to such office, and seize and bring them before the officer issuing such warrant.¹ Upon any books and papers being brought before such officer by virtue of such warrant, he shall inquire and examine whether the same appertained to the office from which the person so refusing to deliver was removed, or of which the term expired, and he shall cause the same to be delivered to the complainant.²

SECTION III.

OF SEARCH WARRANTS ISSUED FOR STOLEN OR EMBEZZLED PROPERTY.

Upon complaint being made on oath, to any of the following officers or magistrates, viz : A Justice of the Supreme Court, a Judge of the Superior Court of Law, of the city and county of New York, a Judge of the County Courts, a Mayor, Recorder or Alderman of a city, a Justice of the Justices' Court, or a Police Justice in the city of New York, or Justice of the Peace or Police Justice, appointed for any city or elected in any town, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property.³

It is made necessary by statute that this complaint should be filed and preserved by the magistrate, and he is to exhibit the same upon the demand of any person affected by the warrant for his perusal, and allow such person by himself or another, to take a copy thereof.⁴

¹ 1 R. S., 125, § 66.

² Id., § 67.

³ R. S., 746, § 32; Id. 706, § 1.

⁴ Laws 1866, ch. 95.

SECTION IV.

OF THE WARRANT.

The place to be described, must be particularly described in the search warrant. Where a part of the complaint was recited in the warrant, in which it was stated that the complainant suspected the stolen property was concealed in the stable of C. P., on the east side of the canal, in the village of Whitehall, in said county, known as the "red barn," and then the warrant gave direction to search the places where the said property was suspected to be concealed, it was held insufficient, for the reason that though the place mentioned in the complaint was sufficiently designated the direction given in the warrant was too general, and authorized the search of any suspected place, instead of confining the search to the place so suspected by the complainant.¹

The warrant should be under seal, and if issued without one, it affords no protection to the officer attempting to enforce it.²

The search warrant should not be granted without oath made before the justice or other officer, that the party complaining has probable cause to suspect his property has been stolen, or is concealed in such a place, and showing his reasons for such suspicion.³

A search warrant under the hand and seal of a justice reciting information on oath that certain goods, describing them, had been stolen by A and B, and were concealed in the house of C, describing it, and commanding the officer to whom it was directed to enter the said house in the day time, and search for the articles stolen, and to bring them with C, or the person in whose custody the goods should be found, before the justice, was held a legal and valid warrant. It does not seem to be essential that the owner of the goods be stated in the warrant.⁴

¹ *People v. Holcomb*, 3 Park. 656.

² *Id.*

³ 2 Hale, 113-150; 2 Wils., 283-291; 11 St. Tr. 321; 5 Iredell, 45.

⁴ *Bell v. Clapp*, 10 John., 263.

SECTION V.

WARRANT, TO WHOM DIRECTED, ETC.

Such warrant shall be directed to the sheriff of the county, or any constable or marshal of the town or city, and shall command him to search the place where such property is suspected to be concealed in the day time (which place shall be described in such warrant), and to bring such property before the magistrate issuing the warrant.¹

A search warrant cannot be sustained as valid when directed to "any constable" of the county in which the search is directed to be made, the statute requiring all such warrants to be directed "to the sheriff of the county, or to any constable or marshal of the town or city" in which the stolen property is alleged to be secreted. The statute contemplates that a search warrant should only be executed by the sheriff of the county, or a constable or marshal of the town or city in which the stolen property is alleged to be secreted. To direct it to any other officer is a violation of the statute, and the direction of a warrant is a material part of it.²

SECTION VI.

SEARCH IN THE NIGHT TIME.

If there be positive proof that any property stolen or embezzled is concealed in any particular house or place, the warrant may authorize the searching of such house or place in the night time.³

SECTION VII.

BY WHOM TO BE EXECUTED.

Every such warrant shall be executed by a public officer, and not by a private citizen.⁴

This was also the rule at common law, though it is fit that the

¹ 2 R. S., 746, § 33.

² *People v. Holcomb*, 3 Park., 656.

³ 2 R. S., 746, § 34.

⁴ 2 R. S., 746, § 35.

party complaining should be present and assisting, because he will be able to identify the property that he has lost.¹

SECTION VIII.

WARRANT, HOW EXECUTED.

In executing a search warrant, the duty of the officer, and those acting in aid of him in executing a search warrant, is well and legally discharged if upon making the search required, and finding goods corresponding in description with those directed to be searched for, he seizes such goods and brings them with the person, whose premises he is directed to search, before a magistrate for further proceedings. The officer is not made the judge in the last resort of the identity of the goods with those stolen.² As the warrant should distinctly specify the goods to be seized, the officer ought not to take any goods but those specified ; thus, where a warrant was granted expressly to seize stolen sugar, and the officer seized tea, he was held to have exceeded his authority, and to be liable to the party aggrieved for a trespass.³ So, also, where the constable having a warrant to search for specific articles alleged to have been stolen, found and took away those and certain others supposed to be also stolen, but not mentioned in the warrant, and not likely to be of use in substantiating the charge of stealing the goods that were specified, it was held that the constable was a trespasser.⁴ In this case, however, the court remarked : " If these articles had been likely to furnish evidence of the identity of the articles stolen, and mentioned in the warrant, there might have been reasonable ground for seizing them, although not specified in the warrant."

In executing a warrant of this description, doors may be broken open, but as in other cases, there should be a previous notification of the business, accompanied by a demand to enter on the one hand, and a refusal on the other, before proceeding to such mode of execution.⁵

¹ 2 Hale, 150; 11 State Tr., 321.

² Stone v. Dana, 5 Metc., 98.

³ 2 Bos. & Pul., 158; 3 Esp. R., 95.

⁴ 9 Dow. & R., 224; 6 Barn. & Cress., 332.

⁵ Banks v. Farwell, 21 Pick., 156; Fost., 320; 2 Hale, 193; 1 Russ. Cr. L., 519; 1 N. & Walsh, 205; Bell v. Clapp, 10 John., 263.

If it shall appear upon the examination before the magistrate, that the property is stolen property, upon satisfactory proof of the title, of any owner thereof, it shall be delivered to him on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate.¹ But if on bringing the goods and the person in whose custody they were found, before the magistrate, it appears that the goods were not stolen, they are to be restored to the possessor.²

All the checks which the English law, and which even the constitution of the United States have imposed upon the operation of these search warrants, and with the manifestation of a strong jealousy of the abuses incident to them, would scarcely have been thought of, or have been deemed necessary, if the warrant did not communicate the power of opening the outer door of a house. In a leading English case, it was asserted by the counsel for the defendant, that on a search warrant to search for stolen goods, the officer might break open doors, &c., and this power was not questioned by the other side, nor by Lord CAMDEN, in the able and elaborate view which he took of the legality and effect of these warrants.³

It is said to be questionable whether a search warrant can be executed, or afford protection to an officer, where it shows upon its face that the party who has the property alleged to be stolen is charged with the larceny of it, and no warrant for his arrest accompanies or is incorporated in the search warrant.⁴

A search warrant legally and regularly issued, and duly executed in the day time, is a protection as well to the party on whose oath it issued, as to the officer who executed it, against an action of trespass.⁵

SECTION IX.

SEARCH WARRANTS FOR MINERAL WATER BOTTLES.

If the owner or agent of any owner of mineral water bottles shall make oath or affirmation before any magistrate, that he

¹ 2 B. S., 747, § 39.

² 1 Num. & Walsh, 260.

³ *Entich v. Carrington*, 2 Wils., 275; 11 St. Tr., 313; *Bell v. Clapp*, 10 John., 263.

⁴ *Peo. v. Holcomb*, 3 Park. 667.

⁵ *Beatty v. Perkins*, 6 Wend., 382.

has reason to believe, and does believe, that any of his bottles, stamped and registered as provided by law, are being unlawfully used by any person or persons selling or manufacturing mineral water or other beverages ; or that any junk dealer or vender of bottles shall have any of such bottles secreted upon his premises, or in any other place, then the said magistrate shall thereupon proceed to obtain the same, under the existing provisions of law in relation to search warrants, which are declared to fully relate to the said purposes ; and the magistrate shall have power in a summary way, to bring or cause to be brought before him, the person in whose possession said bottles may have been found, to examine into the circumstances of his said possession ; and if he shall find, on summary examination, that said person has disobeyed or violated any of the provisions of the act, in relation to such matters, he shall proceed to impose the fine, and if the same be not paid, to commit said person to prison for a term not to exceed fifteen days.¹

SECTION X.

SEARCHING PRISONERS, ETC., FOR PROPERTY.

Any magistrate who shall commit any person charged with any offence to prison, or by whom any vagrant or disorderly person shall be committed, may cause such person to be searched for the purpose of discovering any property he may have, and if any property be found, the same may be taken and applied to the support of such person while in confinement.²

SECTION XI.

OF THE DISPOSITION MADE OF STOLEN PROPERTY.

When property allèged to have been stolen shall come into the possession of any constable, marshal, sheriff or other person authorized to perform the duties of any such officer, he shall hold the same subject to the order of the officers hereafter authorized to direct the disposition thereof. Upon receiving satisfactory proof of the title of any owner of such property, the magis-

¹ Laws 1860, ch. 117, § 2, p. 194.

² R. S., 746, § 36.

trate who shall take the examination of the person accused of stealing such property, may order the same to be delivered to such owner on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate, which order shall entitle such owner to demand and receive such property.

If stolen property shall come into the custody of any justice of the peace or other magistrate, upon satisfactory proof of the title of any owner thereof, it shall be delivered to him on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate. If stolen property shall not have been delivered to the owner thereof, the court before which a conviction shall be had, for the stealing of such property, may, upon proof of the ownership of any person, order the same to be restored to him. If stolen property shall not be claimed by the owner thereof before the expiration of six months from the time any person shall have been convicted of stealing such property, the magistrate, sheriff, constable or other officer or person having the same in his custody, shall deliver the same to the county superintendents of the poor, on being paid the reasonable and necessary expenses incurred in the preservation thereof, to be appropriated to the use of the poor of such county.¹

In New York city and Brooklyn there are special provisions in regard to the keeping and disposition to be made of property taken from persons charged with the commission of crime.²

SECTION XII.

SEARCH WARRANTS FOR PROPERTY PAWNED.

Search warrants may be also issued for property embezzled or taken without the consent of the owner, and which he suspects or believes to have been pledged to any pawnbroker. The constable to whom any such warrant shall have been delivered shall have the same power to execute the same, and shall proceed in the same manner as in the case of a search warrant issued upon a charge of larceny. Upon any property so seized, by virtue of

¹ 2 R. S., 747, §§ 37, 38, 39, 40, 41.

² Laws 1855, ch. 199, § 1.

such warrant being brought before the magistrate who issued the same, he shall cause such property to be delivered to the person so claiming to be the owner thereof, on whose application the warrant was issued, on his executing a bond as hereinafter directed, and if such bond be not executed within twenty-four hours, such justice shall cause the said property to be delivered to the person from whose possession it was taken. The bond above mentioned shall be in a penal sum equal to double the value of the property, with such surety as the justice shall approve, to the person from whose possession the property was taken, with a condition that the person so claiming the same, will on demand, pay all damages that shall be recovered against him in any suit to be brought within thirty days from the date of such bond, by the pawnbroker from whose possession the said property was taken. This search warrant can be issued by any justice of the peace, police justice or assistant justice. In order to authorize the issuing of the warrant, there should be the oath of some person that property belonging to him has been embezzled or taken without his consent, and that he has reason to believe, and does suspect and believe, that such property has been pledged with some pawnbroker. The justice should also be satisfied of the correctness of such suspicions. The warrant is to be directed to any constable of the city or place, commanding him to search for the property so alleged to have been embezzled or taken, and to seize and bring the same before such justice.¹

SECTION XIII.

SEARCH WARRANTS FOR CANAL PROPERTY.

Search warrants can also be issued in certain cases to compel the delivery of books, papers, matters and things belonging to the canals of this State.²

¹ 1 R. S., 711, §§ 9 to 13.

² 1 R. S., 250, § 344.

CHAPTER VII.

OF CORONERS' INQUESTS.

GENERAL REMARKS.

Section I.—JURORS TO BE SUMMONED.

II.—SWEARING THE JURY.

III.—SUSPENSES FOR WITNESSES.

IV.—OF THE EXAMINATION.

V.—INQUISITION OF JURY.

VI.—PROCEEDINGS OF CORONER.

VII.—RETURNING EXAMINATION AND RECOGNIZANCES.

VIII.—JUSTICES WHEN TO ACT AS CORONERS

IX.—DISPOSITION OF MONEY FOUND ON DEAD BODIES.

X.—INVESTIGATION OF THE ORIGIN OF FIRES.

THE coroner's is a very ancient office at the common law, and is of equal antiquity with the sheriff.¹ A coroner's jury is not limited on their inquiry, like a jury upon the trial of one charged with crime. Their duty is to determine if a crime has or has not been committed, and who perpetrated, or caused the same to be perpetrated, and all the circumstances attending it.² In this country no person can be tried upon a coroner's inquisition, yet the inquisition of a coroner's jury finding a person guilty of murder, has about the same force against the accused until the grand jury passes upon his case, that an indictment found by them has thereafter, prior to his trial. In England, however, a defendant may be prosecuted for murder by coroner's inquest, and the finding of such inquest there, is equivalent to the finding of a grand jury; and in cases of murder or manslaughter, where besides the indictment, there is also a coroner's inquisition, it is usual to arraign the prisoner on the inquisition, immediately after arraigning him on the indictment, and to try him on both at the same time. There is, however, this difference between the effect of the two in England, and also in this country, the finding of a grand jury is regarded as of more weight than an inquisition taken before the coroner, as the court will, in their discretion, bail after the latter, but generally refuse after the former; the reason of which may be that in the one case they look into the depositions to see if the evidence supports the charge of murder, whereas in the other the investigation is secret, and does not always admit of a summary revision.³

¹ 1 Blac. Com., 347.² Cro. on Sheriffs, 918.³ Peo. v. Collins, 20 How., 116; 1 Arch. Cr. Pr., 108; 1 East. P. C., 371; 1 Chit. Cr. L., 164.

SECTION I.

JURORS TO BE SUMMONED.

Whenever any coroner shall receive notice that any person has been slain, or has suddenly died, or has been dangerously wounded, or has been found dead under such circumstances as to require an inquisition, it shall be the duty of such coroner to go to the place where such person shall be, and forthwith to summon not less than nine, nor more than fifteen persons, qualified by law to serve as jurors, and not exempt from such service, to appear before such coroner forthwith, at such place as he shall appoint, to make inquisition concerning such death or wounding.¹

It is said that the coroner must summon the jurors in person, and that it must be done personally, in the same manner as jurors are summoned, by a sheriff or other officer, where the selection of the jurors is discretionary with him. He should exercise the same care in summoning the jurors as the officer is required to do in the case of jurors in a civil or criminal proceeding in courts of law. Care should be taken not to summon any person related to the deceased; and if the person who caused the death or wounding is known, or if any suspicion is entertained who he is, no person related to or connected with such person should be summoned; nor should any one who is known to be prejudiced for or against him, be summoned to act as a juror on the inquisition. The same care should be observed in such case to obtain a fair and impartial verdict, as upon the trial of the party accused of the offence; but the jurors, who are selected and appear, are not challengeable by either party.² There can be but one inquest held upon the same body, and therefore the coroner who shall have first taken cognizance of the matter, shall have exclusive jurisdiction therein, unless the first inquisition shall be set aside. One inquisition may be held upon several dead bodies of persons who were killed by the same cause, and died at the same time. The place of holding the inquest must be within the county where such body was found, and in which such coroner

¹ Laws 1847, ch. 118, § 1; 2 R. S., 742, § 1.

² Crocker on Sheriffs, § 913; 2 Hale Cr. L., 59; Wood's Inst., b 4, c 1; 3 Barn. & Adol., 260.

resides, and may be at any place therein, but should be at a convenient place for such purpose nearest the body.¹

And where, on a coroner's inquest, the jury found a verdict that the death was caused by suicide, and nearly five months afterwards the coroner summoned another jury and held a second inquest, at which the jury found that the deceased was killed by H. B., whereupon the coroner issued a warrant of commitment, under which he was imprisoned, on *habeas corpus* the accused was discharged from imprisonment, on the ground that the second inquisition was not authorized by the statute.²

SECTION II.

SWEARING THE JURY.

Whenever (six or more of the jurors) shall appear, they shall be sworn by the coroner to enquire how and in what manner, and when and where such person came to his death, or was wounded, as the case may be, and who such person was, and into all the circumstances attending such death or wounding, and to make a true inquisition according to the evidence offered to them or arising from an inspection of the body.³

After the jury have been sworn by the coroner, they with the coroner go together to view and examine the body of the deceased or the wounded person. It will not be sufficient that they view the body differently and at various times.⁴ And they cannot proceed upon the inquest until they have so viewed the body, and if it be buried it must be dug up.⁵ It is not necessary that the inquest should be held where the body is found, but after the body has been so viewed, the jury may return to some convenient place to hear the testimony of witnesses, and deliberate upon their verdict.⁶

¹ Crocker on Sheriffs, §§ 911, 912.

² *People v. Budge*, 4 Park., 519.

³ Laws 1847, ch. 118, §§ 1, 2; 2 R. S., 742, § 2.

⁴ 1 Chitty, 475; 3 Barn. & A., 260.

⁵ 2 Hale, Cr. L., 58.

⁶ 2 Hawk. P. C., 78; Croc. on Sheriff, § 916.

SECTION III.

SUBPŒNAS FOR WITNESSES.

The coroner has power to issue subpœnas for witnesses returnable either forthwith, or at such time and place as he shall appoint therein, and is the duty of the coroner to cause some surgeon or physician to be subpœnaed to appear as a witness upon the taking of such inquest, and every person served with any such subpœna is liable to the same penalties for disobedience thereto, and his attendance may be enforced in like manner as upon subpœnas issued in justices courts.¹

The subpœnas may be served by the coroner himself, or by any other officer or person, as in other cases.² The witnesses are not entitled to any fees for their attendance, and in case of non-attendance they may be compelled to attend by attachment.

SECTION IV.

OF THE EXAMINATION.

The coroner swears or affirms the witnesses produced and examined before the jury, and he also examines them and reduces their testimony to writing.³

The jury must hear all the evidence offered before them, whether it be in favor or against any party suspected of the killing or wounding, for the jury is to find all the circumstances attending the killing or wounding.⁴

Counsel may be present and assist the coroner in the examination of the witnesses, and the jurors may, if they see fit, put any proper questions to the witnesses, but the party suspected or charged with the crime has no right to produce witnesses on the inquest, or to cross-examine those produced on behalf of the people by himself or counsel. But it is the duty of the coroner to examine any witnesses he may have reason to believe may know anything concerning the matter pertinent to the enquiry,

¹ 2 R. S., 743, §§ 3, 4.

² Croc. on Sheriffs, § 914.

³ Croc. on Sheriffs, § 917; 2 R. S., 743, § 8; Id., 926, § 8, 4th ed.

⁴ Hale's Cr. L., 60, 62.

and to put to any witness any proper and pertinent question that the party may desire. Such party may, however, be attended by counsel on the inquest to advise with him as to his rights as to answering any question that may be put to him when under examination.

If the party accused of the crime be present at the inquest, and is there charged with the crime, or the testimony fastens the crime upon him, and he is called upon by the coroner to testify, it is his duty first to inform the accused that he is at liberty to refuse to answer any question that may be put to him.¹

Where the prisoner was arrested by a constable without warrant, on suspicion of being the murderer of his wife, and taken before the coroner who was holding an inquest on the body of the murdered woman, by whom he was sworn and examined as a witness, it was held that his evidence thus given before the coroner was not admissible on the prisoner's trial for the murder.²

Upon an investigation of the nature treated of in this chapter, the coroner's jury is not limited in their inquiry like a jury upon the trial of one charged with the crime. Their duty is to determine if a crime has or has not been committed, and who perpetrated or caused the same to be perpetrated, and all the circumstances attending it, and any proper testimony tending in any degree to throw light upon the subject, may be properly given. Still nothing but legal testimony should be taken, and a mere matter of opinion, as to who the offender is, should not be permitted, nor should hearsay evidence be indulged in.³

The coroner may cause a post mortem examination of the body to be made by the surgeon or physician subpœnaed before him, if it shall be necessary, and the expense thereof shall be a county charge.⁴

If a physician render services upon an inquest, at the request of the coroner, without notice or stipulation, that he must not look personally to the coroner for payment; it is a debt of the coroner, and may be recovered from him by action.⁵

¹ Cro. on Sheriffs, § 917.

² *People v. McMahon*, 15 N. Y. (1 Smith), 384. Vide *Henderson's Case*.

³ *Crocker v. Sheriffs*, § 918.

⁴ *Id.*, § 919.

⁵ *Van Hoevenberg v. Hasbrouck*, 45 Barb., 197.

SECTION V.

INQUISITION OF JURY.

The jury, upon the inspection of the body of the person dead or wounded, and after hearing the testimony, shall deliver to the coroner their inquisition in writing, to be signed by them, in which they shall find and certify how and in what manner, and when and where, the person dead or wounded came to his death, or was wounded, as the case may be, and who such person was, and all the circumstances attending such death or wounding, and who were guilty thereof, either as principal or accessory, and in what manner.¹

Before signing the inquisition, the jury should retire as jurors in other cases, and deliberate upon their verdict. They must not suffer any one, not even the coroner, to mingle with them in their deliberations; but they may, as in the case of jurors in courts of law, take the opinion of the coroner upon any question of law that may arise upon the investigation.²

The inquisition should show before what coroner the same was taken, and that the same was taken upon the oath of good and lawful men of the county, who were first duly sworn;³ and it should also show when and where the same was executed.⁴ If the person who is found dead or wounded is unknown, or the person who caused death or wounding is unknown, the jury should so find;⁵ and they are not required to find who were accessories after the fact, but they need only inquire of those before the fact.⁶ If the manner of the death is unknown, they should so state; and if the fact so appears before them, they should state whether the killing was accidental or suicide, murder or manslaughter, or excusable or justifiable homicide.⁷ It is not necessary that the jury should be kept together until they shall have agreed upon a verdict, for if there appears to be an irreconcilable difference of opinion as to any material fact amongst the jurors,

¹ 2 R. S., 743, § 5.

² Crocker on Sheriffs, § 921.

³ 2 Hawk. P. C., 77.

⁴ Crocker on Sheriffs, § 922.

⁵ 2 Hale Cr. L., 63.

⁶ 2 Hawk. P. C., 78; 2 Hale Cr. L., 63

⁷ Crocker on Sheriffs, § 922.

concerning which they are to make inquests, the jurors agreeing in opinion may find accordingly, and may present two or more inquisitions.¹

The inquisition is to be signed by the jurors and the coroner. If the names of the jurors are not set out at length in the caption, they must sign their names at length, and not merely the initials of their christian name.² When there are two or more on the inquisition of the same name, it is not necessary to designate them by their abode or addition;³ and if some of the jurors sign with their mark, such signature should properly be attested, but it will be taken *prima facie* that the signing was in the presence of each other.⁴

SECTION VI.

PROCEEDINGS OF CORONER.

If the jury find that any murder, manslaughter or assault has been committed, the coroner shall bind over the witnesses to appear and testify at the next criminal court, at which an indictment for such offence can be found, that shall be held in the county; and in such case, if the party charged with any such offence be not in custody, the coroner shall have power to issue process for his apprehension in the same manner as justices of the peace. The coroner issuing such process, shall have the same power to examine the defendant as is possessed by a justice of the peace, and shall in all respects proceed in like manner.⁵

The power of the coroner under this statute is to be measured by that of justices of the peace throughout the State, and not by that of the justice in the particular locality where the coroner is called to act.⁶

The proceedings had and taken by the coroner subsequent to the issuing of his warrant for the apprehension of the party charged with the offence, in relation to the service of the warrant, and the arrest of the accused, and from his arrest during his

¹ Crocker on Sheriffs, § 923.

² 3 Car. & P., 602; 6 Id., 179.

³ 7 Car. & P., 538.

⁴ 2 Lew. C. C., 125; Crocker on Sheriffs, § 922.

⁵ 2 R. S., 743, §§ 6, 7.

⁶ *Peo. v. Beigler*, 3 Park., 316.

examination, are the same as those had upon the arrest and examination of offenders upon a complaint made for an offence not triable in a Court of Special Sessions. These proceedings will be found set out in detail in a subsequent chapter, relating to proceedings had upon such examinations.¹

Under the statute above cited, the coroner can only examine the prisoner in the same manner that a justice of the peace would in a like case, and is not authorized to examine witnesses either against the prisoner or for him, when he is apprehended by virtue of process, issued subsequent to the finding of the inquisition by the jury, or is in custody of the coroner without process at the time the same is found. He issues his process for the apprehension of the accused when not in custody, solely upon the inquisition, and also his mittimus to send him to prison to await the action of the Grand Jury; he has no power to take testimony to establish the innocence of the prisoner, and then discharge him contrary to the finding of his jury.²

SECTION VII.

RETURNING EXAMINATION AND RECOGNIZANCES.

The testimony of all witnesses examined before a coroner's jury, shall be reduced to writing by the coroner, and shall be returned by him, together with the inquisition of the jury, and all recognizances and examinations to the next criminal court of record that shall be held in the county.³

The whole of the examination should be taken down in due form, and each examination must have a jurat showing that the witness was duly sworn or affirmed by the coroner, or it will not be read in evidence upon the trial, and a deposition in pencil is irregular.⁴

In practice, the examinations, testimony and recognizances are filed with the clerk of the next court of criminal record to be held in the county, and when such court is either the Court of Sessions or of Oyer and Terminer, they are filed in the office of

¹ Vide post.

² *Peo. v. Collins*, 20 How., 115; 1 Chit. Cr. L., 264; 2 Hale P. C., 63.

³ 2 R. S., 743, § 8.

⁴ 22 Wend., 167.

the County Clerk. The remarks made in regard to the necessity of filing correct and proper minutes of the evidence which are made upon the subject of examination and recognizances filed by justices of the peace and other officers upon the examination of persons charged with criminal offences, not triable in a Court of Special Sessions, apply equally as well in these cases.¹ The recognizances should be in writing, and be subscribed by the parties to be bound thereby. The statute directing the taking of such recognizances, does not in terms empower the coroner, as in the case of an examination of a criminal, to commit the witnesses in the case of a refusal to do so, and coroners had no such right at the common law.²

The coroner should bind over only those witnesses who testify to some material fact against the accused, and not those who are called for the purpose of exculpating him.³

SECTION VIII.

JUSTICES WHEN TO ACT AS CORONERS.

Any justice of the peace in each of the several towns and cities of the State, is authorized and empowered, in case the attendance of a coroner cannot be procured within twelve hours after the discovery of a dead body upon which an inquest is by law required to be held, to hold an inquest thereon, and with the like force and effect as coroners; and in all cases in which the cause of a death is not apparent, it is the duty of the justice to associate with himself a regularly licensed physician to make a suitable examination for the discovery of said cause.⁴

In case of the absence of the coroners of the city and county of New York, or of their inability to attend from sickness or any other cause at any time, any alderman or special justice of the city may perform, during such absence or inability, any duty appertaining to the coroners of the said city; and such alderman or justice shall possess the like authority, and be subject to the like obligations and penalties, as the said coroners.⁵

¹ Vide post.

² Cro. on Sheriffs, § 924.

³ 9 Car. & P., 672.

⁴ Laws 1864, ch. 379, p. 879.

⁵ Laws 1852, ch. 289; 2 R. S., 743, § 9.

In the county of Ulster, in towns where the coroner is absent, or where there are no coroners, the justices of the peace of the town may act as such.¹

Also, when any dead body shall be found in the water, or upon the shore bordering certain towns in the county of Kings, if no coroner shall appear within three hours after the discovery of the dead body, any justice of the peace residing in the town in which such body was found may hold the inquest.²

SECTION IX.

DISPOSITION OF MONEY FOUND ON DEAD BODIES.

The coroners of the several counties of this State are required to deliver over to the treasurers of their respective counties all moneys and other valuable things which may be found with or upon the bodies of persons on whom inquests may be held, and which shall not have been claimed by the legal representatives of such person or persons within sixty days after the holding of such inquest; and in default thereof the said treasurers are authorized and required to institute the necessary proceedings to compel such delivery.³

It is the duty of the county treasurers to convert such valuable thing into money, and place the same to the credit of the county and the legal representatives of the person on whom the same was found. Within six years thereafter the treasurer is to deduct the expenses of the coroner and of the county, and pay the balance over to such legal representatives.⁴

Before auditing and allowing the account of the coroners, the supervisors of the county shall require from them respectively a statement in writing containing an inventory of all money and other valuable things found with or upon all persons on whom inquests shall have been held, and the manner in which the same has been disposed of, verified by the oath or affirmation of the coroner making the same, that such statement is in all respects correct and true, and that the money and other articles mentioned

¹ Laws 1863, ch. 395.

² Laws 1863, ch. 126, p. 194.

³ Laws 1842, ch. 155, § 1; 2 R. S., 743, § 11.

⁴ Id., § 2; Id., § 11.

therein have been delivered to the treasurer of the county or the legal representatives of such person or persons.¹

SECTION X.

INVESTIGATION OF THE ORIGIN OF FIRES.

Whenever it shall be made to appear by the affidavit of a credible witness, that there is ground to believe that any building has been maliciously set on fire, or attempted to be, any coroner, sheriff or deputy sheriff of the county in which such crime is supposed to have been committed, to whom such affidavit shall be delivered, and who shall be requested in writing by the president, secretary or agent of any insurance company, or by any two or more reputable freeholders, to investigate the truth of such belief, shall do so without delay; and for this purpose he shall possess all the powers conferred upon coroners for the purpose of holding inquests by the Revised Statutes. The jury, after inspecting the place where the fire was, or was attempted, and after hearing the testimony, shall deliver to the officer holding such inquest, their inquisition in writing, to be signed by them, in which they shall find and certify how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner; but if such jury shall be unable to ascertain the origin and circumstances of such fire, they shall find and certify accordingly. If the jury find that any building has been designedly set on fire, or has been attempted so to be, the officer holding such inquest, shall bind over the witnesses to appear and testify at the next criminal court, at which an indictment for such offence can be found that shall be held in the county; and in such case, if the party charged with such offence be not in custody, the officer holding such inquest, has power to issue process for his arrest in the same manner as justices of the peace. The officer issuing such process, has the same power to examine the party arrested as is possessed by a justice of the peace, and is in all respects to proceed in a like manner. The testimony of all witnesses examined before the jury, is to be reduced to writing by the officer holding the inquest, and is to be re-

¹ Laws of 1842, ch. 155, § 3; 2 R. S. 743, § 12.

turned by him, together with the inquisition of the jury, and all recognizances taken by him to the next criminal court of record that shall be held in such county.¹

The provisions of the above act do not extend to the cities of New York, Brooklyn and Buffalo.²

¹ 1 R. S., 715, § 1, *et seq.*, Laws 1857, ch. 504.

² *Id.*, § 8. Vide Laws 1852, ch. 322, as modified 1857, ch. 569, § 36.

CHAPTER VIII.

OF BASTARDY PROCEEDINGS.

THE question has frequently arisen whether prosecutions under statutes, for the maintenance and support of bastard children against the putative father, are of a civil or criminal nature. The English courts incline to consider such cases as of a criminal nature.¹

In Massachusetts, the proceedings have been regarded as partly civil and partly criminal, but so far criminal as to be proceeded with and disposed of in criminal courts.²

There is a large class of offences which injure both the public and individuals, such as larceny, assaults, burglary, arson, and the like ; but these are in their nature so manifestly injurious to the public as to give no room for doubt of their liability to public prosecution. On the other hand, numerous offences seem to be purely public in their character, such as acts endangering the public health, public morals and decency, public peace and public justice. These become, by their very existence, criminal, it being immaterial in fact whether they have produced injury to any individual or not.³ The theory of these proceedings is that the putative father should be compelled, by arrest and prosecution, to support and maintain a bastard child, which has become, or is likely to be born and be, a public charge, and thus relieve the public from the support of a pauper in a case where such father is primarily responsible for its support and maintenance.

It is not intended in this chapter to examine the various questions which arise in bastardy proceedings, so far as the location and settlement of the mother is concerned, or the various proceedings taken by the superintendents of the poor in relation to the mother and child, or the property of the putative father or mother of such child, but only to examine the proceedings consequent

¹ 1 Lead. Cr. Cas., 25, note; R. v. Archer, 2 T. R., 270; R. v. Bowen, 5 Id., 156; R. v. Fernoll, 1 Eng. L. and Eq., 575.

² Hill v. Wells, 6 Pick., 104; Cummings v. Hodgdon, 13 Met., 246; Hyde v. Chapin, 2 Cush., 77; Smith v. Hayden, 6 Cush., 111.

³ 1 Lead. Cr. Cas., 26, note.

upon the arrest of the putative father, and his appeal from the adjudication had upon such proceedings. The other questions in regard to the settlement of the matter, and proceedings had by the superintendents of the poor in regard to the support of the mother and child, and the seizure of the property of absconding putative fathers or mothers of bastards, will be found provided for by the various sections of the Revised Statutes.¹

For the purpose of convenience, the matters spoken of are divided into two sections, the first comprising the proceedings upon the arrest of the putative father, and the making of the order of filiation; and the second treating of the appeal from the determination of the justices upon such hearing.

SECTION I.

PROCEEDINGS TO OBTAIN ORDER OF FILIATION.

Section I.—WHO ARE BASTARDS.

- II.—APPLICATION TO JUSTICE.
- III.—ISSUING OF WARRANT.
- IV.—PROCEEDINGS AGAINST FATHER OUT OF COUNTY.
- V.—BOND TAKEN BY JUSTICE INDORSING WARRANT OUT OF COUNTY.
- VI.—PROCEEDINGS UPON FAILURE TO EXECUTE BOND.
- VII.—PROCEEDINGS UPON RETURN OF THE WARRANT.
- VIII.—ADJOURNMENT OF PROCEEDINGS.
- IX.—OF THE PENALTY OF BONDS.
- X.—FATHER, HOW DISPOSED OF DURING EXAMINATION.
- XI.—PROCEEDINGS AND DETERMINATION OF JUSTICES ON HEARING.
- XII.—BOND TO BE ENTERED INTO AND COSTS PAID BY PERSON ADJUDGED REPUTED FATHER.
- XIII.—WHEN FATHER TO BE DISCHARGED AND WHEN COMMITTED.
- XIV.—PROCEEDINGS UPON RETURN OF BOND TAKEN OUT OF COUNTY ON INDORSED WARRANT.
- XV.—EXAMINATION IN SUCH CASE.
- XVI.—MOTHER OF BASTARD COMPELLED TO TESTIFY.
- XVII.—MOTHER, WHEN COMPELLED TO SUPPORT BASTARD.
- XVIII.—PROCEEDINGS IN CASE OF REFUSAL.
- XIX.—AMOUNT ORDERED TO BE PAID MAY BE INCREASED OR REDUCED.
- XX.—COMPROMISE WITH PUTATIVE FATHERS.

§ 1. WHO ARE BASTARDS.

Within the meaning of the provisions of the Revised Statute every child is to be deemed a bastard who shall be begotten and born

1. Out of lawful matrimony.
2. While the husband of its mother continued absent out this State for one whole year previous to such birth, separa

¹ 1 R. S., 642, et. seq.

from its mother, and leaving her during that time continuing and residing in this State.

3. During the separation of its mother from her husband pursuant to a decree of any court of competent authority.¹

§ 2. APPLICATION TO JUSTICE.

If any woman shall be delivered of a bastard child which shall be chargeable, or likely to become chargeable to any county, city or town, or shall be pregnant of a child likely to be born a bastard, and to become chargeable to any county, city or town, the superintendents of the poor of the county, or any of them, where such woman shall be, shall apply to some justice of the peace of the same county to make inquiry into the facts and circumstances of the case.²

§ 3. ISSUING OF WARRANT.

Such justice shall, by examination of such woman on oath, and upon such other testimony as may be offered, ascertain the father of such bastard, or of such child likely to be born a bastard, and shall thereupon issue his warrant, directed to a constable of the county, commanding him forthwith to apprehend such reputed father, and to bring him before such justice, for the purpose of having an adjudication respecting the filiation of such bastard, or of such child likely to be born a bastard.³

It is laid down by a writer upon the duties of constables, that although these proceedings are *quasi* criminal in their character, it is not conceived that the officer holding the warrant would be authorized in executing the same like a criminal process. That the safer course will be for the officer to proceed upon the warrant, as upon process for the arrest of the defendant in a civil action. The warrant may be executed in any part of the county by day or night, but not upon Sunday, and the door of the defendant's dwelling house cannot be broken open to arrest him in the first instance. But it is otherwise, if after due arrest he shall have escaped.⁴

The proceedings under the statute, respecting bastardy, are not

¹ 1 R. S., 642, § 1; 15 Barb. 286.

² 1 R. S., 642, § 5; 10 John., 93.

³ 2 R. S., 642, § 6.

⁴ Cro. on Sheriffs, § 1051.

Every constable or other officer to whom any bond of the putative father of a bastard, or of a child likely to be born a bastard, taken out of the county where the warrant was issued, shall be delivered as hereinbefore directed, who shall neglect or refuse to deliver the same to the justice who issued such warrant, within fifteen days after the receipt of the same, shall forfeit the sum of twenty-five dollars, to be sued for, and recovered by, and in the name of any overseers of the poor, or county superintendents, at whose instance the said warrant was issued.¹

§ 6. PROCEEDINGS UPON FAILURE TO EXECUTE BOND.

If the person so charged and apprehended shall not execute the bond so required, with one or other of the conditions aforesaid, to the satisfaction of the justice before whom he shall be brought, then the constable or other proper officer, having such warrant, shall take the person so apprehended before the justice who originally issued such warrant.²

If any justice who shall have issued any warrant for the apprehension of the father of a bastard, or of a child likely to be born a bastard, shall have died, vacated his office, or be absent on the return of such warrant, the constable who may apprehend such father shall carry him before some other justice of the same town, who shall have the same authority to proceed therein as the justice who issued such warrant.³

In such case the constable's return to the warrant should show the death, vacancy or absence of the justice who issued the warrant before any other justice should take cognizance of the matter.⁴

§ 7. PROCEEDINGS UPON THE RETURN OF THE WARRANT.

Upon the person so charged with being the father of such bastard, or of such child likely to be born a bastard, being brought before the justice who issued the warrant for his apprehension, whether he was arrested in the same or in any other county, the said justice shall immediately call to his aid any other justice of the same county; and the said two justices shall proceed without unnecessary delay to make examination of the matter, and shall

¹ 1 R. S., 656, § 70.

² 1 R. S., 644, § 10.

³ 1 R. S., 656, § 72.

⁴ Vide post. page.

again examine the mother of such bastard, or the woman so pregnant as aforesaid, on oath, in the presence of the persons so charged or apprehended, touching the father of such child, and shall hear any proofs that may be offered in relation thereto ; and on the application of the person so charged, or of the persons appearing in behalf of the public, either of the said justices shall issue a subpoena to compel the attendance of witnesses before them, which may be enforced, and the witnesses may be compelled to appear and testify in the same manner as in any civil cause before a justice of the peace.¹

§ 8. ADJOURNMENT OF PROCEEDINGS.

If the said justices shall not be prepared to proceed, or the person charged shall require delay, and give sufficient reasons therefor, they may adjourn such examination for any time not exceeding six weeks, and shall take a bond with sureties from such person for his appearance at such time before them, in the penalty hereinafter directed.²

Under the provisions of the statute providing that the justices may adjourn the proceeding on taking from the defendant a bond for his appearance at the adjourned day, the appearance intended is not merely a temporary one, but his continued appearance and attendance until the examination and subsequent proceedings are finally closed.³

In the case cited above, the defendeant after giving the bond appeared, and after the examination voluntarily departed, contrary to the direction of the justices. The justices took a recess, and after reassembling, and calling and waiting for the defendant, made an order of filiation in his absence, and adjourned without day, it was held that his voluntary departure, and not being present to answer and receive notice of the order, was a breach of the bond. That it was immaterial that he intended to return, or actually did next day return to the place and offer to the justices to submit himself to imprisonment upon their warrant, as in the case of neglect to give a bond. That it was immaterial in an action on the bond, whether the justices had power to make the order in defendant's absence ; and it was further regarded as

¹ 1 R. S., 641, § 11.

² 1 R. S., 644, § 12.

³ *Peo. v. Jayne*, 27 Barb., 58.

be approved by them, with one or other of the following conditions: First. That such person will pay weekly, or otherwise as shall have been ordered, such sum for the support of the said child, and for the sustenance of its mother, as aforesaid, as shall have been ordered, or shall at any time thereafter be ordered by the court of sessions of the same county, and that he will fully and amply indemnify the county, and town or city, where the said bastard shall have been born, or where the woman likely to have such bastard shall be, and every other county, town or city which may have incurred any expense, or may be put to any expense for the support of such child or its mother during his confinement and recovery therefrom, against all such expense. Or, second. That such person will appear at the next court of sessions of the said county, and not depart the said court without its leave.¹

It has been held that the bond must be for one or the other of the two conditions, not for both. If it contains both conditions, so as to provide that the obligor should appear, and that he should indemnify, it is a nullity; it was so held in a case which rejecting one condition as repugnant, would not have succeeded to maintain the action.² If the bond literally follows the provisions of the statute, it is valid, however superfluous any of its provisions may be. Thus, a bond which embraced the sustenance of the mother during her confinement, is valid, although it was given several years after the birth of the child; such bond is in conformity with the statute.³

The mother's ability to support the child, does not relieve the father from his liability in the recognizance. The child does not on that account, cease to become chargeable to the town.⁴

After an order of filiation, an infant is bound by law to support his illegitimate child, and his bond pursuant to the statute is binding on him, notwithstanding his infancy⁵.

¹ 1 R. S., 645, § 14.

² Hoagland v. Hudson, 8 How., 343. See *Peo. v. Tellin*, 13 Wend., 59 ante.

³ *Peo. v. Mitchell*, 4 Sandf., 466.

⁴ *Peo. v. Corbett*, 8 Wend., 520; *Peo. v. Haddock*, 12 Id., 475.

⁵ *Peo. v. Moores*, 4 Den., 518; 25 Wend., 698; 6 Mass., 80; 4 Id., 376; Id., 83.

§ 13. WHEN FATHER TO BE DISCHARGED AND WHEN COMMITTED.

Upon such bond being executed to the satisfaction of the justices, they shall discharge such person from his arrest. But if he refuses or neglect to execute a bond with one of the conditions aforesaid, or to pay the costs and charges so certified, he shall be committed by such justices, or either of them, to the common jail of the city or county by warrant, there to remain until discharged by the Court of Sessions, or until he shall execute such bond, in the penalty which shall have been required by the justices.¹

If the reputed father of a bastard child, against whom an order of filiation has been made, shall not pay the amount certified for the costs of apprehending him ; and of the order of filiation, the justices may issue a warrant for his commitment, though he has executed the bond pursuant to the statute; and where such bond has been given, but the costs are not paid, the warrant should direct the father to be safely kept until discharged by the Court of Sessions, or until he shall pay the costs. As the party may be committed on different grounds, and as the statute does not prescribe the form of the warrant of commitment, it may be adapted to the nature of the case.²

§ 14. PROCEEDINGS UPON RETURN OF BOND TAKEN OUT OF COUNTY ON INDORSED WARRANT.

When any bond taken out of the county as aforesaid, by which the person charged shall be bound to appear at the next Court of Sessions, shall be returned to the justice who issued the warrant, such justice shall in like manner call in the aid of another justice of the peace of the same county, and the said two justices shall proceed in manner aforesaid, to examine and determine who is the father of such bastard, or of such child likely to be born a bastard, and shall make an order of filiation, and prescribe the sum to be paid by such putative father for the support of such child, and for the sustenance of the mother as aforesaid, and shall certify the reasonable costs of apprehending the said father, and of the order of filiation.³

¹ 1 R. S., 645, § 15.

² *Peo. v. Stowell*, 2 Den., 127.

³ 1 R. S., 646, § 18.

§ 15. EXAMINATION IN SUCH CASE.

Such examination and order may be made in the absence of the person so charged, unless before the same be made, he shall personally require of the justice issuing the warrant, that such examination be made in his presence; in which case reasonable notice of the time and place of such examination shall be given to the person so charged. He may appear and offer testimony in relation to the matters to be inquired into, and the same proceedings shall be had as in the case of the person so charged, being brought before such justice.¹

Where the bond is taken out of the county, though the condition is simply to indemnify, the justices have power to make an order of filiation in the absence of the putative father.²

§ 16. MOTHER OF BASTARD COMPELLED TO TESTIFY.

In making any examination hereby authorized; the justice or justices may compel the mother of a bastard, so chargeable, or likely to become chargeable, or a woman pregnant with a child likely to be born a bastard, and to become so chargeable, to testify, and disclose the name of the father of such bastard or child; and, in case of her refusal, may, after the expiration of one month from the time of her delivery, if she shall be sufficiently recovered, commit her to the common jail of the county, by a warrant under his hand, or the hands of such justices in which the cause of commitment shall be distinctly set forth, there to remain until she shall testify and disclose the name of such father.³

§ 17. MOTHER WHEN COMPELLED TO SUPPORT BASTARD.

If the mother of a bastard child, chargeable or likely to become chargeable as before declared, be possessed of any property in her own right, any two justices of the peace of the county where such mother may be, on the application of any county superintendent or overseer of the poor, shall examine into the matters, and in their discretion make order for the keeping of such bastard, by charging such mother with the payment of money week-

¹ 1 R. S., 646, § 19.

² *Peo. v. Tilton*, 13 Wend., 597.

³ 1 R. S., 646, § 20.

ly, or other sustentation for the support of such child, as they shall think meet.¹

§ 18. PROCEEDINGS IN CASE OF REFUSAL.

If after the service of such order subscribed by the said justices upon such mother, she shall refuse, or neglect to perform the same, she shall be committed to the common jail of the county, there to remain without bail until she comply with such order, unless she shall execute a bond to the people of this State in such sum as the said justices shall direct, with good and sufficient sureties, to appear at the then next court of sessions in the said county, and not to depart the said court without its leave.²

§ 19. AMOUNT ORDERED TO BE PAID MAY BE INCREASED OR REDUCED.

The justices who shall have made any order of filiation or maintenance against the father or mother of any bastard, may, from time to time, vary the amount therein directed to be paid, by reducing the same as circumstances may require; and upon the application of any county superintendent or overseer of the poor interested therein, and after ten days' notice to be given to the party who may be affected thereby, the court of sessions of the county may increase the sum in and by such order, directed to be paid for the support of any bastard; and the said court, on the application of any person affected by such order, and after the same notice to the superintendents or overseers, at whose instance it was procured, may reduce the amount directed to be paid by any such order.³

§ 20. COMPROMISE WITH PUTATIVE FATHERS.

Superintendents of the poor in any county in this State have power to make such compromise and arrangements with the putative fathers of any bastard children within their jurisdiction, relative to the support of such children, as they shall deem equitable and just, and thereupon to discharge such putative father from all liability for the support of such bastards.⁴

So also may the commissioners of the alms house of the city

¹ 1 R. S., 646, § 21.

² 1 R. S., 646, § 22.

³ 1 R. S., 647, § 23.

⁴ Laws 1832, ch. 26, § 2; 1 R. S., 656, § 69.

of New York, or any two of them, make the like compromise and arrangement with the putative fathers of bastard children in said city.¹

Whenever a compromise shall be made with the putative father of a bastard child, pursuant to the above provisions, the mother of such child, on giving security for the support of such child and to indemnify the city and county or the town and county from the maintenance of the child to the satisfaction of the officers making the compromise, shall be entitled to receive the moneys paid or secured by such putative father as the consideration of such compromise.²

And when the mother of such child shall be unable to give such security, but shall be able and willing to nurse and take care of the child, she shall be paid the same weekly allowance for nursing and taking care of the child out of the moneys paid by the father on such compromise as he shall have been liable to pay by the order of filiation. Such weekly sum to be paid the mother may be prescribed, regulated or reduced as in the case of an order of filiation.³

A compromise between superintendents of the poor and the putative father of a bastard child, whereby the latter is discharged from his bond to the people for the support of the child in case its mother refuses to give it to him, is void.⁴

Superintendents of the poor have no authority or power to discharge the putative father of a bastard from a bond given for the support of the child without some compensation or equivalent, which will effectually secure the support and maintenance of the child in the manner contemplated by the statute, or at least tend to assure such support. The compromise and arrangement, which the statute authorizes them to make with the father, must tend to the support of the child and not to depriving it of support, and, unless by the arrangement something is taken or secured for the support of the child beyond contingency, the superintendents exceed their powers and the discharge is void.⁵

¹ 1 R. S., 656, § 68.

² Laws 1838, ch. 202, § 1; 1 R. S., 656, § 74.

³ Id. § 2; 1 R. S., 656, § 75.

⁴ *Peo. v. Mitchell*, 44 Barb., 245.

⁵ Id.

SECTION II.

OF APPEALS IN BASTARDY.

- Section XXI.—RIGHT OF APPEAL.
 XXII.—NOTICE OF THE APPEAL.
 XXIII.—PROCEEDINGS BETWEEN THE NOTICE AND HEARING OF THE APPEAL.
 XXIV.—PROCEEDINGS ON THE HEARING OF THE APPEAL.
 XXV.—WHEN COURT OF SESSIONS MAY MAKE ORIGINAL ORDER.
 XXVI.—PROCEEDINGS WHEN ORDER QUASHED FOR INFORMALITY.
 XXVII.—DUTY OF COURT OF SESSIONS WHEN FATHER OR MOTHER IMPRISONED.
 XXVIII.—OF THE COSTS OF THE APPEAL.
 XXIX.—PROCEEDINGS ON BONDS TAKEN FOR APPEARANCE AT SESSIONS AND FOR SUPPORT OF BASTARDS, ETC.

§ 21. RIGHT OF APPEAL.

The Revised Statutes, after designating the method in which determinations shall be made by justices of the peace in bastardy cases, provide that any person who shall think himself aggrieved by any order or determination of any two justices of the peace, made pursuant to the authority given in said statutes, may appeal therefrom to the next court of sessions, to be holden in the same county, excepting any person who shall have executed a bond to perform any order of filiation and of settlement, and to indemnify the public who shall be concluded thereby, and shall not be permitted to appeal from any other part of such order than such as fixes the weekly or other allowance to be paid.¹

An appeal to the Sessions from an order of filiation or sustenance made by two justices of the peace, pursuant to the provisions of the Revised Statutes, concerning the support of bastards, destroys the effect of the order as *res judica*; and if after such appeal, the proceeding is discontinued by the overseers of the poor who made the complaint, the overseers of any other town which is, or is likely to become chargeable, may institute new proceedings notwithstanding such former order,—that is that an order of filiation, on being appealed from, loses its force as an adjudication.

It is virtually a suit commenced before the two justices, and continued before the sessions, but which never reached a final determination.²

The appeal given by the act from the order of the justices, is only from an affirmative order, charging the reputed father. An

¹ 2 R. S., 647, § 24.

² Stowell v. Overseers, 5 Den., 98.

order or decision that the person charged is not proved to be the father, is conclusive. The act directs that he shall then be forthwith discharged, and no appeal lies from such order.¹

§ 22. NOTICE OF THE APPEAL.

Whenever a bond shall be entered into by a person charged as the father of a bastard, or of a child likely to be born a bastard, or by the mother of a bastard, for his or her appearance at the next court of sessions, the same shall be deemed an appeal from the order of filiation or sustenance, or both as the case may be, and no further or other notice thereof shall be required.

In other cases of appeal, notice shall be given to the justices making the order and to the other party affected by such order, or to the superintendent or overseers at whose instance the same was obtained, at least ten days previously.²

§ 23. PROCEEDINGS BETWEEN THE NOTICE AND HEARING OF THE APPEAL.

The statute provides that no justice of the peace, who shall have assisted in any judgment or in making any order appealed from, shall sit in the court of sessions upon the hearing of any appeal made from such judgment or order.³

The justices who shall have taken or received any bond for the appearance of any party at the sessions, shall transmit the same to the clerk of the court before the opening thereof, together with the orders of maintenance and sustenance, which shall have been made, or true copies thereof signed by the justices making the same.⁴

Subpœnas shall be issued by the clerk of the court in vacation as well as in term, and be delivered to any party to such appeal requiring the same; and obedience to such subpœnas shall be enforced and the witnesses summoned may be compelled to testify in the same manner as in criminal cases pending in such court.⁵

¹ *Peo. v. Tompkins*, 19 Wend., 154; See 5 Hill, 443.

² 1 R. S., 647, § 24.

³ 1 R. S., 647, § 25.

⁴ *Id.* § 26.

⁵ *Id.* § 27.

§ 24. PROCEEDINGS ON THE HEARING OF THE APPEAL.

The court to which such appeal may be made shall proceed to hear the allegations and proofs of the respective parties, and the party in whose favor any order was made which shall be the subject of appeal, shall be required to substantiate the same by evidence. If the mother of any bastard be dead or insane, the testimony given by her on her examination shall be received in the same manner as if she was present and testified to the same.¹

On an appeal to the sessions from an order of bastardy the appellant is not entitled to a trial by jury.²

The court may affirm or quash any order of affiliation or sustenance, or may reduce or increase the sum directed by any such order to be paid for the support of a bastard or for the sustenance of its mother, but no such order shall be quashed for any defects in the form thereof; but the same shall be amended by the said court according to the facts and justice of the case. If, at the time of hearing such appeal, the child supposed likely to be born a bastard shall not be born, the court may adjourn such hearing from time to time until such child be born, and shall take a recognizance from all parties bound to appear.³

If the woman so pregnant shall be married before she be delivered of such child, or if she shall miscarry so that such child shall not be born alive, or if it shall appear that she is not so pregnant, then the person charged as the father of such child shall be discharged from custody, if imprisoned, or from his bond or recognizance by the court of sessions of the county before whom such fact shall appear, or shall be immediately relieved out of custody by warrant under the hands and seals of the justices by whom he was committed, upon such fact appearing to them.⁴

If upon such hearing the court of sessions affirm the order of filiation, by which any person shall be determined to be the father of a bastard or of a child likely to become a bastard, the said court shall require such person immediately to enter into a bond to the people of this State in such sum as it shall prescribe,

¹ 1 R. S., 648, § 28.

² *Roy v. Targere, Com'rs, &c.*, 7 Wend. 359.

³ 1 R. S., 648, § 29.

⁴ *Id.*, § 30.

with good and sufficient sureties, conditioned that such person shall pay weekly or otherwise, as shall have been directed by the order of filiation and sustenance, such sum for the support of such bastard or child, and for the sustenance of its mother during her confinement and recovery therefrom, as shall have been ordered by two justices of the peace, or as the same shall have been or thereafter shall be modified by the court of sessions, and that he will fully and amply indemnify the county and town of the county and city where the said bastard shall have been born or where the woman likely to have such bastard shall be, and every other county, town or city which may have incurred such expense, or which may be put to any expense, for the support of such child or its mother during her confinement or recovery therefrom.¹

If any person, against whom such order shall be affirmed, shall refuse or neglect to execute such bond with such sureties to the satisfaction of the said court, he shall be committed to the common jail of the county, by an order of such court, there to remain until he shall execute such bond, or be discharged by the said court.²

If any person bound to appear at any court of sessions, on charge of being the father of a bastard or of a child likely to be born a bastard, shall depart the said court without executing the bond it may require, or without being discharged by the said court from the bond executed by such person for his appearance, the said bond shall be thereby deemed to be forfeited, and may be prosecuted as hereinafter directed.³

Where the mother of any bastard shall be bound to appear at any court of sessions, to answer on account of any order made against her for the support of such bastard, or shall be committed for neglect or refusal to enter into such bond, the court shall examine into the matter, compel the attendance of witnesses, and hear the allegations and proofs of the parties in the same manner as hereinbefore directed in the case of an appeal.⁴

If the court shall be satisfied that such mother has property in her own right, so as to be able to support such bastard, or con-

¹ 1 R. S., 648, § 31.

² Id., 32.

³ Id., 33.

⁴ Id., § 34.

tribute to its support, it shall confirm the order made for that purpose and may in its discretion, vary the amount ordered to be paid or otherwise. If not so satisfied, the court shall discharge the woman from her bond, and if in custody, from her custody.¹

If it affirm such order, it shall require the said mother to give bond in such sum as it shall prescribe, with sufficient sureties of the people of this State, conditioned that such mother shall comply with, and obey the order for the support of the child, so made and affirmed as the same shall have been made, and may thereafter be modified by the court of sessions. If she refuse, or neglect to execute such bond, she shall be committed by an order of the said court, to the common jail of the county, there to remain until she shall execute such bond, or until she shall be discharged by the court.²

On appeal to the sessions from an order of bastardy, the order shall be considered as *prima facie* evidence of the truth of the facts stated in it, and the onus of impeaching it, is thrown on the appellant.

An appeal opens the whole matter anew, and if the order of the sessions was for the payment of a certain sum for lying in wait, the expenses should be proved in the sessions, unless waived by the appellant, and on certiorari, the proof will be deemed to have been waived, unless an objection to a confirmation on that ground appears to have been taken in the sessions.⁴

An order of the sessions confirming the order below, may be enforced by attachment for the money and cost directed by it to be paid if the bond given by the appellant on the order, is not conditioned for their payment.⁵

On an appeal from the sessions, affirming the order of filiation, it will be intended that the appellant was proven to be the father, though the return do not show it.⁶

§ 25. WHEN COURT OF SESSIONS MAY MAKE ORIGINAL ORDER.

If the court of sessions quash any order of filiation and maintenance for any other reason than upon the merits and facts, such

¹ 1 R. S., 648, § 35.

² Id., § 36.

³ Sweet v. Overseers of Clinton, 3 John, 23.

⁴ Roy v. Targee, 7 Wend., 359.

⁵ Idem.

⁶ Overseers of Minden v. Cox, 7 Cow., 235.

court shall proceed and make an original order of filiation in the same manner as any two justices of the peace may by law, or such court shall bind over the person charged, to appear at the next sessions.¹

§ 26. PROCEEDINGS WHEN ORDER QUASHED FOR INFORMALITY.

In case of any order being quashed for any other reason than on the merits, and the person charged being bound over as aforesaid, the same proceedings may be had by the justice of the peace, for the apprehension of the person charged as father of a bastard, or of a child likely to be born a bastard, and for the making of an order of filiation and maintenance, and for the commitment of such person, in default of executing any bond required by law as are in the statutes authorized in the first instance, and the same proceedings shall be subsequently had in all respects.²

§ 27. DUTY OF COURT OF SESSIONS WHEN FATHER OR MOTHER IMPRISONED.

Whenever any person shall be committed to prison, charged as the father of a bastard, or of a child likely to be born a bastard, and whenever any mother of a bastard shall be so committed for their default in not executing a bond to support such child, or to indemnify the public, it shall be the duty of the court of sessions of the county to inquire from time to time into the circumstances and ability of such father or mother to support such bastard, or to procure sureties to be bound with either of them.³

If the court shall at any time be satisfied that such father or mother is wholly unable to support such child, or to contribute to its support, or to procure sureties to be bound with either of them, the said court may, in its discretion, order such father or mother to be discharged from such imprisonment.⁴

Before any order for such discharge should be entered, the court shall be satisfied that reasonable notice has been given to the overseers of the poor, or the county superintendents at

¹ 1 R. S., 650, § 39.

² 1 R. S., 650, § 40.

³ 1 R. S., 650, § 41.

⁴ Id., § 42.

whose instance such father or mother may have been committed, of the intention to apply for such discharge, and shall hear the allegations and proofs of the said superintendents or overseers, and may examine such father or mother on oath in relation to their circumstances.¹

Whenever any father or mother shall be lawfully committed for the causes in the last section specified, or either of them, he or she shall not be discharged from imprisonment under or by virtue of any insolvent act, or any other act for the relief or discharge of imprisoned debtors, or in any other way, until discharged by the court of sessions of the county.²

§ 28. OF THE COSTS ON THE APPEAL.

The court shall award costs to the party in whose favor any such appeal shall be determined, and to any party to whom notice of appeal shall be given and not prosecuted. When awarded against any county superintendents or overseers of the poor of any town not liable for the support of its own poor the amount shall be paid by the county treasurer on the production of a certified copy of the order and of the taxed bill of such costs, and shall be by him charged to the town which shall be bound to support such bastard, if any town in the same county be so liable, and if there be no town so liable, then to be charged to the county.³

In other cases the payment of such costs may be enforced by rule and attachment of the same court, or by an action founded on the order for their payment. If the party against whom costs are awarded, reside out of the jurisdiction of the court of sessions, an action may be brought on such order by the party entitled to such costs, in which the production of a certified copy of the order and of a taxed bill of the costs shall be sufficient evidence.⁴

The prevailing party in an appeal from an order of filiation, to whom costs are awarded, is entitled only to taxable costs.⁵

¹ 1 R. S., 650, § 43.

² Id., § 44.

³ 1 R. S., 649, § 37.

⁴ Id., § 38.

⁵ Supts. of Ontario v. Moore, 12 Wend., 273.

§ 29. PROCEEDINGS ON BONDS TAKEN FOR APPEARANCE AT SESSIONS AND FOR SUPPORT OF BASTARDS, ETC.

The bonds taken by any justice or justices of the peace for the appearance of any person charged as the father of a bastard, or of a child likely to be born a bastard, or for the appearance of any mother of a bastard child at any court of sessions, shall be signed by the persons binding themselves as principal and sureties, and shall be transmitted by the justice taking the same or receiving the same from any constable, as in the Revised Statutes provided, to the said court, at the opening of the next term thereof.¹

If any default shall be made by which such bond shall become forfeited, the court shall cause the same to be prosecuted by the district attorney of the county, and the penalty thereof shall be recovered, and when collected shall be paid to the county treasurer; to be by him credited to the town liable for the support of the bastard, if there be any such town in the county, and if there be none then to be credited to the county.²

Whenever a bond shall be taken to perform any order that may be made in relation to the support of any bastard, or of any child likely to be born a bastard, or for the sustenance of its mother, and any breach shall happen in the condition thereof, the same may be prosecuted, in the name of the people of this State, by the county superintendents of the county or the overseers of the poor of the town which was liable for the support of such bastard or child, or which may have incurred any expense in the support of such bastard or child, or in the sustenance of its mother during her confinement and recovery therefrom.³

In such action the breaches of the condition shall be assigned, as in actions brought on bonds with condition other than for the payment of money, and the same proceedings shall be had in all respects. It shall not be necessary to prove the actual payment of money by any county superintendent, overseer of the poor or other person; but the neglect to pay any sum which shall be ordered to be paid by any competent authority for the support of the child or the sustenance of its mother, shall be deemed a breach of the condition of such bond, and the amount

¹ 1 R. S., 651, § 45.

² Id., § 46.

³ Id., § 47.

of damages to be assessed in such case shall be the sum which was so ordered to be paid and which was withheld up to the time of the commencement of such suit with interest thereon.¹

For any breaches of the condition of such bond which shall happen after the recovery of any damages or the commencement of any suit, a *scire facias* may be issued and the same proceedings had as in actions brought on bonds with conditions other than for the payment of money. All moneys which shall be collected upon any such bond shall be paid to the county treasurer, and by him credited to the town liable for the support of such bastard, if there be any such town in the county and if there be none then to be credited to the county.²

If in any such suit upon a bond in the name of the people the same shall be discontinued, or non-prossed, or judgment shall pass for the defendant on verdict, demurrer or otherwise, the relators and their successors in office shall be liable to pay such costs as the court shall award; which payment may be enforced by rule and attachment of the court, and shall be reimbursed by the county treasurer and be by him charged to the town liable for the support of such bastard, if there be any such town in the same county, and if there be none to the county.³

An action may be maintained by the county superintendents of the county, or by the overseers of the poor of the town which may be liable for the support of any bastard or child likely to be born a bastard, or which may have incurred any expense or be liable to any expense in the support of such child or the sustenance of its mother upon any order that may be made by any two justices of the peace or by a court of sessions for the payment of a sum, weekly or otherwise, for such support or sustenance, notwithstanding a bond may have been executed to comply with such order and to indemnify any such county or town, and in case of the death of the person against whom such order was made an action may also be maintained on such order against his executors or administrators; but when a bond is entered into to appear at the next sessions no action shall be brought on any such order until the same shall have been affirmed by the said sessions.⁴

¹ 1 R. S., 651, § 48.

² Id., 49.

³ Id., § 50.

⁴ Id., § 51.

CHAPTER IX.

OF SUMMARY CONVICTIONS.

GENERAL REMARKS.

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By a summary proceeding in this chapter, is meant such as is directed by the several acts of the Legislature (for the common law is a stranger to it, except in the case of contempts), for the conviction of offenders, and the infliction of certain punishments created by those acts. In these there is usually no intervention of a jury, but the person accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge.¹ The exception giving a jury trial, is by amendment to the act concerning the disturbance of religious meetings. Although there is no jury trial, the proceedings must be according to the course of the common law in trials by jury. There must first be an information or charge, and the defendant must

¹ 4 Blac. Com., 280.

be summoned and have an opportunity to make his defence. The evidence in support of the charge must be such as the common law approves, unless specially directed otherwise by statute, and there must be a conviction, judgment and execution, all according to the course of the common law.¹

Justices of the Peace, Mayors, Recorders and Aldermen of cities have the power, in certain instances, to arrest and cause the arrest of persons, and enter upon the examination of offences, and impose punishment therefor in a summary manner, without jury trial. In some instances this power is conferred upon justices of the peace alone, and in other cases any of the officers above named, may execute the authority. This arrest, examination and punishment of offenders in a summary way, without the intervention of a jury, are founded entirely upon special authority, conferred and regulated by acts of the Legislature, and are mostly embraced in the provisions of the statutes in relation to the internal police of the State.²

No new offence is cognizable in that manner, unless expressly made so by statute, and all the proceedings under, an authority so created, must be strictly conformable to the regulations prescribed by the special law, in each instance, from which all their force is derived.³ The question has been raised in our courts whether the authority conferred by the Legislature was not unconstitutional, in depriving the accused, by proceeding in a summary manner, of the right of trial by jury; and it was held that the Constitution does not require a trial by jury in every case of a criminal nature, but only in all cases in which it had been used at the time of the adoption of the new constitution. The summary proceedings against rogues and vagabonds, and disorderly persons, formed a part of the common law of the colony of New York, derived from the English statutes, and was brought by our ancestors to this country as a part of their law, and were embodied in the act of 1788, for apprehending and punishing disorderly persons (2 General Laws, 52), and the substance of the provisions of the latter act, was incorporated into 1 Revised Statutes, 639. As the proceedings under this title of the Revised

¹ *Reo. v. Phillips*, 1 Park., 95.

² 1 R. S., 612.

³ *Barb. Cr. L.*, 2d ed., 586; *Paley on Convic.*, 1; 1 N. & W., 471; *Smythe*, 238.

Statutes, preserve all the rights of the accused which he had before, and give him some additional rights in a proceeding in which the right of trial by jury has never existed in this State, both that statute and the act of 1833 enlarging it, are constitutional, although they extend to some offences of the same nature and character, which were not embraced in the act of February, 1788.¹

But though the Legislature may add new offences of the same grade or class as those previously constituting a disorderly person, they cannot, by declaring an offence which at common law was indictable, *e. g.*, keeping a bawdy house, to be punishable summarily under the provisions relating to disorderly persons. Hence, the provisions of the statute, by which keepers of bawdy houses are declared disorderly persons, and subjected to summary punishment without trial by jury, are unconstitutional and void.²

The principal cases in which magistrates are authorized to proceed summarily to conviction and punishment, will be found stated below. In addition to those where punishment is authorized to be made, there are a large number of cases mentioned in the statutes, which, although in their nature of a *quasi* criminal character, the summary proceedings are for the recovery of a statutory penalty, and the nature of the proceedings are rather those of a civil action than of a prosecution for the commission a criminal offence. In many instances the statutory provisions are silent in regard to the details of the proceedings treated of in this chapter, and in such cases, reference must be had to the common law for instruction in the course to be pursued.³

SECTION I.

THE COMPLAINT.

Some of the provisions of the statute require a complaint to be made upon oath; though it is not requisite that the complaint should be upon oath if not required by the statute.⁴ It has been said that the only case in which a complaint can be dispensed

¹ *Duffy v. Peo.*, 6 Hill., 75. Vide *Morris v. Peo.*, 1 Park., 441; *Plato v. Peo.*, 3 Park., 586. Vide *Wynehammer v. The Peo.*, 13 New York, 378.

² *Warren v. Peo.*, 3 Park., 544.

³ 1 Stra., 45.

⁴ *Paley on Convic.*, 15, 60; *Bos. on Pen. Stat.*, 16.

with, is that in which the magistrate is authorized to convict upon his own view.¹ The complaint should not be entertained if not made within the specified time in those cases where the complaint is required by statute to be made within a specified time after the commission of the offence.²

The expression in most statutes, limiting the time within which summary prosecutions are to be brought, is that the prosecution, etc., shall be "within — months or days after the commission of the offence, and in accordance with this rule, the complaint or conviction, as the case may be, should in such cases be, at the farthest, on the last day of the prescribed period, counting the day on which the offence was committed inclusively.³

Where the complaint is in any case required by the statute to be in writing, it should be in that form. If made in writing, the following requirements should be observed :

It should be addressed to the magistrate by his name and style, to show his jurisdiction on the face of the proceedings.⁴

It should be dated so as to appear subsequent to the offence, and prior to the other proceedings, as well as, also, to show that it is made within the time specified by the statute authorizing the proceedings.⁵

It should contain a precise statement of the offence charged, for the evidence given on the examination can only support the original charge, and cannot supply what is lacking in the complaint; and the offence should, in all respects, be brought within the statute.⁶

It should contain a positive charge against the accused; stating the facts upon information and belief are insufficient to justify the magistrate in issuing a warrant, if the attendance of the person from whom the information was derived can be procured.⁷

No intendment is admitted to help out a defective description of the offence, by reason of the omission of an essential averment;⁸ but the use of words in the complaint synonymous with

¹ Paley on Convic., 15, 60.

² 1 Nun. & Walsh, 476.

³ 1 N. & W., 477; Doug. 446-478; 15 Ves., 247; 9 Barn. & Cress., 134, 603.

⁴ 1 Stra., 261.

⁵ 1 Ld. Ray., 510; 2 id., 1546; Paley, 58.

⁶ 2 Salk, 680; Doug., 232; Paley on Conv., 65; 2 Ld. Ray., 1268; Id., 791.

⁷ Comfort v. Allen, 13 Abb., 276; 10 Mod., 155; Paley, 96.

⁸ Paley, 68; 1 T. R., 122.

those in the statute is sufficient, although the precise words of the statute are not followed. Thus a complaint, stating that the accused attended a meeting for carrying on a combination of journeymen, "*for the purpose of obtaining an advance of wages,*" was held sufficient where it was made, under a statute prohibiting "combinations to obtain an advance of wages."¹

SECTION II.

THE WARRANT.

Many of the statutes in relation to summary convictions require the magistrate to issue a warrant. Where, however, the statute does not in express terms direct that a warrant should be issued, but jurisdiction of the offence is conferred upon him, or he is empowered to cause the offender to be brought before him, he is authorized to grant a warrant to cause his apprehension.²

Some of the statutes authorize the summary arrest of the person without any warrant or process. It is believed to be the better practice, when such an arrest is made, to convey the offender at once before a magistrate and there make a complaint, and cause the issuing of a warrant against the accused. It is held in England that a summons, or under our practice a warrant, is indispensably necessary in all penal proceedings of a summary nature, and it was so declared by Lord KENYON to be an invariable rule of law.³

The general regulations in regard to the form and requirements of the warrants, the arrest of the accused thereunder, and the return of the warrant, are essentially the same as those issued for the arrest and examination of persons charged with graver offences, and will be found discussed in a subsequent chapter.⁴ It has, however, been held that a person arrested under the statute relative to disturbing religious meetings, must be carried before the magistrate who issued the warrant. The provisions of

¹ 5 Barn. & Ald., 527.

² 1 Chit. Cr. L., 31; Barb. Cr. L., 2d ed., 622.

³ 1 Salk., 181; 6 Mod., 41; 8 Mod., 154, note; 6 T. R., 198. See 4 Blac. Com., 283, cases collected in notes, Phila. ed. of 1861.

⁴ Vide post.

the statute, allowing an examination before the nearest magistrate in certain cases, does not apply.¹

The term warrant implies a seal, except where the seal has been dispensed with by statute.² But it has been decided in this State that it is an error to suppose that proceedings under the Revised Statutes, for disturbing religious meetings, can only be commenced by process actually issued. Parties may voluntarily, within the time limited by statute, as in any other case, appear and join issue or confess the complaint.³

SECTION III.

APPEARANCE AND PLEA.

The accused, on being brought before the magistrate, should be allowed a reasonable time for his defence, if he requires it.⁴ He may interpose the same pleas to which he would be entitled in a court of higher jurisdiction; for instance, he may demur to the complaint, plead to the jurisdiction, not guilty, in bar or in abatement.⁵ The several forms of pleas, which a defendant may make to a criminal charge, will be subsequently considered.⁶

Many of the statutes in terms allow the magistrate to convict upon the confession of the accused; but, although the statute may only empower the justice to convict upon the oath of one or more witnesses, this implies a power to convict upon the confession of the party alone.⁷ The confession, to be effectual, should not only appear to agree with the charge, but it should, also, contain an admission of such specific facts as amount to the complete offence complained of; for a confession cannot extend or help out the description of the offence, as charged in the complaint. The plea of guilty is only to the facts which are charged in the complaint, and if these facts are so defectively charged, that it does not appear on the face of the complaint that the

¹ *Peo. v. Fuller*, 17 Wend., 211.

² 3 Hill, 495.

³ *Foster v. Smith*, 10 Wend., 377.

⁴ *Paley on Conv.*, 22.

⁵ *Barb. Cr. L.*, 2d ed., 624; *Davis*, 780; 17 Wend., 211.

⁶ *Post*.

⁷ *Holton on Sum. Conv.*, 46; 1 *Stra.*, 545; *Smythe*, 245; 1 *Burn.*, 889; *Barb. Cr. L.*, 2d ed., 623.

defendant has committed any offence against the statute, the plea will not authorize a conviction.¹

The confession, upon which the justice may convict, means a plea of guilty or its equivalent, and not a deduction of the magistrate from the prisoner's examination.²

The rule, that a criminal trial cannot proceed unless the defendant, or an attorney expressly authorized by him to appear for him at the time, so far as mere misdemeanors are concerned, applies only to the trial of an indictment. Where a summary trial is had without an indictment, the defendant may be tried in his absence, if he has once appeared.³

SECTION IV.

WITNESSES AND PROOF.

Although no mode of examination be pointed out by the statutes giving jurisdiction over the offence, yet justice requires that the accused should be confronted with the witnesses against him, and have an opportunity of cross-examination. For, though the Legislature, by a summary made of inquiry, intended to substitute a more expeditious process for the common law method of trial, it could not design to dispense with the rules of justice as far as they are compatible with the method adopted. Indeed, it may be useful upon this occasion to notice the general maxim, which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, namely: That "Acts of parliament in what they are silent, are best expounded according to the use and reason of the common law."⁴

The magistrate, as incident to his power to examine into this class of charges, has power to bring before him all persons who appear to be material witnesses, either upon the part of the people or of the accused.⁵ The attendance of the witnesses may be compelled by subpœnea and attachment, the same as upon the examination of offenders who are charged with more serious crim-

¹ Holton on Sum. Conv., 47; Paley on Conv., 108; Barb. Cr. L., 2d ed., 623.

² *Bennac v. Peo.*, 4 Barb., 164.

³ *Blythe v. Tompkins*, 2 Abb., 468.

⁴ *Rex v. Simpson*, 1 Stra., 45.

⁵ 1 Chit. Cr. L., 76.

inal accusations.¹ The magistrate cannot pronounce judgment in the absence of any proof. The statute directs in such cases that the magistrate shall proceed summarily to inquire into the facts.² The general rules of evidence in relation to the competency and credibility of witnesses, and the legality of the character of the evidence offered, which govern other criminal examinations and trials, apply to these summary convictions. It was not the design of the legislators that there should be a relaxation from the strict rules of evidence required by courts of record; but summary convictions are an institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harrassing the freeholders with frequent and troublesome attendance to try every minute offence.³ The evidence upon the part of the people should establish every fact and circumstances necessary to constitute the offence, and should support all the material allegations in the complaint.⁴ Thus satisfactory evidence that a female is "a common prostitute and idle person," will not authorize her conviction as a vagrant under the statute "common prostitutes," and "idle persons" are not necessarily vagrants; it is only "common prostitutes who have no lawful employment whereby to maintain themselves," and "idle persons who, not having any visible means to maintain themselves, live without employment," that come within the vagrancy acts. These acts are constitutional, but should be construed strictly and executed carefully in favor of the liberty of the citizen.⁵

SECTION V.

JUDGMENT.

The testimony having been concluded, the magistrate is to render his decision. The judgment is said to consist of two points, viz: the conviction or acquittal, and the sentence or award of punishment. The latter, when pecuniary, should also state the distribution of the penalty, and, in some cases, the assessment of

¹ Post.

² *Peo. v. Fuller*, 17 Wend., 211.

³ 4 Blac. Com., 281.

⁴ Holt on convic., 55; 1 Burn, 881; Barb. Cr. L., 2d ed., 625.

⁵ *Peo. v. Forbes*, 4 Park., 611.

costs. The judgment must be such, in point of law, as is strictly warranted by the premises.¹

Where a discretion is vested in the magistrate in regard to the penalty, either as to the object, or rate, or appropriation thereof, or where any sum is to be assigned, by way of satisfaction or reward, the judgment must, in such cases, specifically appoint the manner and the proportion in which the penalty is to be distributed; for then it becomes a necessary part of the judgment, and should appear in the record.²

But where the penalty is expressly appropriated by the statute, as where it is ordered to be divided equally between the poor of the parish and the party aggrieved, the judgment need not contain any award to that effect, but it is sufficient if it award the penalty to be distributed as the act directs.³

Each offender must be fined separately, whether he be condemned to pay the whole penalty imposed by the act, or only a part of it; for otherwise one, who had paid his proportionable part, might be detained in prison till all the others had paid theirs; which would be in effect to punish him for the offence of another.⁴

Upon conviction, under an act which inflicted a penalty of twenty pounds on any person who may disturb or disquiet any congregation, it was held that several persons, for a joint disturbance, were liable to separate penalties of twenty pounds each.⁵

SECTION VI.

RECORDS OF CONVICTION.

A record of the conviction should be made out and filed by the magistrate in cases of conviction. In some cases the statute specifies that the record should specify generally the nature and circumstances of the offence.⁶ In other instances it states gene-

¹ Paley on Conv., 151.

² 2 T. R., 96; 1 East., 189.

³ 8 East., 573; 1 Salk., 383; 2 T. R., 18.

⁴ 6 Nev. & Man., 57; 1 Nun. & Walsh, 558.

⁵ 5 T. R., 542.

⁶ 1 R. S., 638, § 2.

rally that a record of conviction should be filed.¹ The filing of a record of conviction is essential to the validity of a commitment by a police justice for vagrancy.² But it has been held to be unnecessary in cases of disorderly conduct, under the statute applicable to the city of New York.³ No formal style of adjudication is necessary upon a conviction, as in judgments at common law; it is enough if it be said in the record of conviction: "Therefore, the defendant (naming him), is convicted of the premises or of the offence," &c., followed by an adjudication of the forfeiture without the formal words, "Therefore, it is considered," &c., or "That the defendant, according to the form of the statute, is convicted," and the words, "That the defendant is convicted," are sufficient, though the form given in the statute uses the words, "Duly convicted."⁴

The record should be signed, sealed and dated by the magistrate on the day when signed.⁵

The magistrate should insert in the record of conviction, the evidence given upon the examination had before him.⁶

Upon the return to a writ of certiorari, to review a summary conviction, Mr. Justice EDMONDS laid down the following doctrine upon this branch of the subject:

The power of summarily convicting offenders, being in derogation of the common law, must be strictly confined to the special statute from which its force is derived. The restrictions and regulations relative to these convictions, established by the higher courts in England before the revolution, were declaratory of the common law, and are binding in this State, unless they may have since been repealed or altered by statute. A record must be made up in every such case as a pre-requisite to commitment, and trespass will lie against a magistrate who commits without having so done. The reasons for its necessity are: 1. For the protection of the accused, that he may not again be convicted of

¹ 1 R. S., 633, § 3.

² *Montague's Case*, 19 Abb., 413, note.

³ *Case of the twelve commitments*, 19 Abb., 394.

⁴ 1 *Ld. Raym.*, 583; *Carth.*, 502; 2 *T. R.*, 18; 4 *Id.*, 768; 2 *Barb. Cr. L.*, 2d ed., 627. *Vide* 1 R. S., 633, § 11, for precedent in New York city.

⁵ *Paley on Convic.*, 42; 1 *Burn.*, J., 743.

⁶ *Mullins v. Peo.*, 24 *New York*, 403.

the same offence; 2. For protection of the magistrate, a proper record being conclusive evidence in his favor in cases within his jurisdiction; 3. In the absence of an appeal, the only mode by which the accused can obtain a review of the sentence, is by habeas corpus or certiorari, founded on the record. Greater certainty is required in such records than in indictments, because they are taken as true against the accused, and nothing will be presumed in favor of the commitment, but the presumption will be against it.

The record is designed to show the regularity of the proceedings, and that the sentence is supported by legal evidence; therefore, everything necessary to support a conviction, must appear upon it. It must set forth:

1. The particular circumstances constituting the offence, to show that the magistrate has conformed to the law, and has not exceeded his jurisdiction. A mere statement of the offence in the terms of the statute is insufficient.

2. The plea of the defendant, whether confession or denial.

3. The names of the witnesses, to show their competency.

4. That the evidence was given in the presence of the accused, that it may appear that he had an opportunity of cross-examination.

5. The whole evidence, both for the prosecution and defence—so far as applicable to the charge, to show that every material allegation was sustained by proof.

6. An adjudication of the guilt of the accused, which must be exact and precise; judgment for too little being as bad as for too much.¹ But since the making of such decision, the Legislature have authorized a more general form of record of conviction in cases of conviction for vagrancy in the city of New York.²

All records of conviction by the magistrates of the several police courts, and all bail bonds and papers taken in said courts, are required to be filed by the clerks designated to keep record books of said courts, and arranged according to law.³

¹ *Peo. v. Phillips*, 1 Park, 95.

² *Laws* 1853, ch. 183, p. 353; vide *Morris v. Peo.*, 1 Park, 44.

³ Vol. 2, *Laws* 1867, ch. 961, § 2, p. 2450.

SECTION VII.

EXECUTION AND COMMITMENT.

The statute, in cases where a pecuniary penalty is imposed, usually directs the collection of the same by execution, by distress, and sale of the goods and chattels of the offender. In other cases, in case the costs and penalty is not paid forthwith or in case the execution cannot be collected, the magistrate is authorized to commit the offender to the common jail. This is done by a warrant of commitment. The general rules, applicable to the form of a warrant of commitment of the accused upon an examination of persons charged with offences of a higher nature, will apply to this class of offences.¹ The warrant should carefully recite the conviction on which it is granted, and should not be in any respect repugnant thereto; for, when there has been a good and valid conviction, but on the face of the commitment no offence was disclosed, or an error was made, so as to make the description of the offence vary from that stated in the conviction, it was held that the magistrate was liable to an action of trespass on account of such omission or variation.²

In relation to the form of commitments for vagrancy there are conflicting decisions. In one case it was held, that it was not necessary that the record of the commitment should state the grounds on which the charge of vagrancy was based; that it was enough that they show that the prisoner had been charged with being a vagrant and was convicted of that offense.³

In another case it was held, that, where a person is committed as a vagrant, the record and commitment should set forth the grounds upon which the charge of vagrancy was based.⁴

¹ Vide post.

² 2 Bing. R., 483; Barb. Cr. L., 2d ed., 632.

³ *Peo. v. Grey*, 4 Park, 616; *Gray's Case*, 11 Abb., 56.

⁴ *Peo. v. Forbes*, 4 Park, 611; *Forbes' Case*, 11 Abb., 52; Vide *Mullins v. Peo.*, 24 N. Y., 399; Cited post.

SECTION VIII.

REVIEW OF PROCEEDINGS.

In regard to a review of these proceedings, no method of appeal is pointed out by the statute, and, unless a power of appeal is expressly given by the Legislature, there is no appeal.¹

A common law writ of certiorari, however, lies to review the proceedings, as that is the proper process for correcting any error that may have occurred in the proceedings of an inferior court, when such proceedings are in any stage of them different from the course of the common law, unless some different process is given by statute;² and the application of the writ is not confined to the decisions of courts properly so called, nor to proceedings in actions, but comprehends the determination of magistrates and officers exercising judicial powers affecting the property or rights of the citizen, and who act in a summary way, or in a new course, different from the common law.³

Ordinarily, upon common law writs of certiorari, the record is examined only to see if the subordinate tribunal has kept within the limits of its jurisdiction, but in these cases, the superior tribunal may examine into the record to see if there was no evidence tending to establish the main facts. Thus, on a common law certiorari for the removal of summary convictions before magistrates, the power of review is not confined to the jurisdiction or the regularity of the proceedings, but extends to all other legal questions, and unless it appears upon the face of the record that there was evidence sufficient to warrant the conviction, it will be quashed. The magistrate, in these cases, must insert the evidence in the record of the conviction itself, for the express purpose of enabling the superior court, upon a certiorari, to determine upon the face of the conviction whether it was lawful, and although the court would not interfere upon the mere weight of the evidence, yet a conviction without any evidence to support it should be reversed or quashed as erroneous.⁴

A conviction as a disorderly person, and a commitment there-

¹ 6 East., 514; Wightw., 22; 4 M. & S., 421; 8 T. R., 218, note 6; Id., 542.

² U. S. Dig., *Certiorari*, 1, 2, 3; *et seq.*, 2 Burr. Pr., 195.

³ 25 Wend., 167; 2 Hill, 9, 14.

⁴ *Mullins v. Peo.*, 24 N. Y., 399. Vide 4 Barb., 164; 6 N. Y., 309; 20 Wend., 103; 16 Abb., 473; 40 Barb., 626; 26 How., 152; 15 Barb., 286.

for, is not affected by suing out a certiorari, or giving a recognizance. Certiorari is no supersedeas to an execution already issued.¹

In conclusion, it may be said that all summary proceedings are watched with extreme jealousy by the common law. The slightest error is fatal. Thus, under the vagrant act, it is not sufficient to say the party is charged upon oath, but the magistrate must state that the oath was believed, and that he was thereupon convicted.²

SECTION IX.

DISORDERLY PERSONS.

All persons who shall abandon or neglect to support their wives or children, or who threaten to run away and leave their wives or children a burthen on the public; all persons pretending to tell fortunes, or where lost or stolen goods may be found; all common prostitutes; all keepers of bawdy houses, or houses for the resort of prostitutes, drunkards, tipplers, gamesters, or other disorderly persons; all persons who have no visible profession or calling to maintain themselves by, but who do for the most part support themselves by gaming; all jugglers, common showmen and mountebanks, who exhibit or perform for profit; any puppet show, wire or rope dance, or other idle shows, acts, or feats; all persons who keep in any public highway or place, or in any place where spirituous liquors are sold, any keno table, wheel of fortune, thimbles, or other table, box, machine, or device for the purposes of gaming; all persons who go about with such table, wheel, or other machine or device, exhibiting tricks or gaming therewith; all persons who play in any public streets or highways with cards, dice or any other instrument or device for gaming, are, by our statutes, deemed disorderly persons.³

Where the charge was made that the prisoner had abandoned his wife, and neglected and refused to provide for her, and that for two weeks he had refused to pay her board and support her, and that he had refused, for several months, to permit her to

¹ *Matter of Goodhue*, 1 City H. Rec., 153.

² *Rose v. Cooper*, 6 Term., 509. *Matter of Stephen*, 1 Whee. Cr. Cas., 327.

³ 1 R. S., 638, § 1, as Amended Laws 1861, ch. 127, p. 244.

reside with him and to associate with her children, and retained her clothing, and refused to let her have the same, and that he was a disorderly person; held that, no threats of running away or leaving his wife or children a burden to the public having been alleged in the case, the specifications did not come within the statute.¹

So it was also held, that refusing to live with one's wife or to support her, on the ground that her former husband is still living, was not a ground of conviction.²

But, since the making of the decisions above referred to, the Legislature have amended the Revised Statutes by inserting in the first line of the statute, after the word persons, as follows: "who shall abandon or neglect to support their wives or children, or."³

SECTION X.

PROCEEDINGS AGAINST THEM.

Upon complaint being made, on oath, to any justice of the peace, against any person as being disorderly, he shall issue his warrant for the apprehension of the offender, and cause him or her to be brought before such justice for examination.⁴

In order to warrant the conviction of the offender, the complaint must bring the offender within some of the specifications enumerated in the statute, as constituting the offence.⁵

SECTION XI.

SURETY FOR GOOD BEHAVIOR.

If it shall appear by the confession of the offender, or by competent testimony, that he or she is a disorderly person, the justice may require of the offender sufficient sureties for his or her good behavior, for the space of one year.⁶

¹ *Peo. v. Carroll*, 3 Park, 82.

² 4 Barb., 164.

³ *Laws* 1861, ch. 127, p. 244.

⁴ 1 R. S., 638, § 2.

⁵ 4 Park., 73.

⁶ 1 R. S., 638, § 2.

The justice has no power to proceed to organize a court of special sessions, and on conviction, to punish the accused by fine and imprisonment.¹

SECTION XII.

RECORD OF CONVICTION AND COMMITMENT.

In default of such sureties being found, the justice shall make up, sign and file in the county clerk's office, a record of the conviction as a disorderly person, specifying generally the nature and circumstances of the offence, and shall, by warrant under his hand, commit such offender to the common jail of the city or county, there to remain until such sureties be found, or such offender be discharged according to law.² The justice has no power to commit upon conviction until his record is made up and filed, and the court will not presume on certiorari that this was done, if it do not appear by the return.³

The warrant of commitment is valid to protect the officer if it describes the offence, and the conviction and sentence, although it does not recite the facts proved.⁴

SECTION XIII.

BREACHES OF RECOGNIZANCE.

It shall be deemed a breach of such recognizance, for any person so bound, on account of being a gamester, at any one time, or sitting to play or bet for any money or other thing exceeding the sum or value of two dollars and fifty cents. In other cases, the committing of any of the acts which constituted the person so bound a disorderly person, shall be deemed a breach of the condition of such recognizance.⁵

¹ *Peo. v. Carroll*, 4 Park., 73.

² 1 R. S., 638, § 2, 19 Abb., 269.

³ *Bennac v. Peo.*, 4 Barb., 164.

⁴ *Bennac v. Peo.*, 4 Barb., 31.

⁵ 1 R. S., 639, § 3.

SECTION XIV.

PROSECUTIONS THEREFOR.

If any breach of such recognizance for good behavior happens, such recognizance shall be prosecuted at the instance of any overseer of the poor, county superintendent of the poor, or justice of the peace, and the penalty when collected, shall be paid into the county treasury, for the benefit of the poor of such county.¹

Where a recognizance was taken from one who was convicted of being a disorderly person, in that he had abandoned or neglected to provide for his wife, it was held that, upon an action upon the recognizance, the sureties might defeat a recovery, by pleading and proving, notwithstanding the conviction, that the woman alleged to have been abandoned, &c., was not the wife of the principal.²

SECTION XV.

CONSEQUENCES OF RECOVERY.

Upon a recovery being had upon any such recognizance, the court before which it shall be had, may, in its discretion, either require new sureties for good behavior to be given, or may commit the offender to the common jail of the city or county for any term not exceeding six calendar months.³

SECTION XVI.

TWO JUSTICES MAY DISCHARGE IN CERTAIN CASES.

Any person committed to the common jail for not finding sureties for good behavior, may be discharged by any two justices of the peace of the county, upon giving such sureties for good behavior as were originally required from such offender.⁴

The magistrate before whom the conviction takes place, has no authority, acting singly, to take a recognizance for good behavior

¹ 1 R. S., 639, § 4.

² *Duffy v. Peo.*, 6 Hill, 75.

³ 1 R. S., 639, § 5.

⁴ 1 R. S., 639, § 6.

after the record of conviction is filed.¹ Neither has he such power after the record has been made and signed, though not filed.²

SECTION XVII.

KEEPER OF JAIL TO EXHIBIT LISTS, ETC.

It is the duty of the keeper of every jail to lay before the court of sessions, on the first day of its meeting next after the commitment of any disorderly person, a list of the persons so committed and then in his custody, with the nature of their offences, the name of the justice committing them, and the time of imprisonment.³

SECTION XVIII.

DUTY OF COURT OF SESSIONS.

The court of sessions shall inquire into the circumstances of each case, and hear any proofs that may be offered, and shall examine the record of conviction, which shall be deemed presumptive evidence of the facts therein contained until disproved. The court may discharge such disorderly person from confinement, either absolutely or upon receiving sureties for his or her good behavior, in its discretion, or the said court may, in its discretion, authorize the county superintendents of the poor, or the commissioners of any alms-house, to bind out such disorderly persons as shall be minors in some lawful calling, as servants, apprentices, mariners, or otherwise, until they shall be of full age respectively, or to contract for the service of such disorderly persons as shall be of full age, with any person, as laborers, servants, apprentices, mariners, or otherwise, for any term not exceeding one year, which binding out and contracts shall be as valid and effectual as the indenture of any apprentice with his own consent and the consent of his parents, and shall subject the persons so bound out or contracted to the same control of

¹ *Peo. v. Brown*, 23 Wend., 47.

² *Peo. v. Duffy*, 5 Barb., 205.

³ 1 R. S., 639, § 7.

their masters respectively, and of the court of sessions, as if they were so bound as apprentices.

The said court may also, in its discretion, order any such disorderly person to be kept in the common jail, for any term not exceeding six months, at hard labor, or may direct that during any part of the time of imprisonment, not exceeding thirty days, such offender shall be kept on bread and water only. If there be no means provided in such jail for employing offenders at hard labor, the court may direct the keeper thereof to furnish such employment as it shall specify to such disorderly person as shall be committed thereto, either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding in amount such sum as the court shall prescribe, and to compel such persons to perform such work as shall be so allotted to them.¹

SECTION XIX.

EXPENSES HOW DEFRAYED.

The expenses incurred in pursuance of such order shall be paid to the keeper by the county treasurer on the production of the order of the court, and an account of the materials purchased, verified by the oath of the keeper.²

SECTION XX.

ACCOUNTING FOR PROCEEDS OF LABOR.

The keeper shall sell the proceeds of such labor, and shall account for the first cost of the materials purchased, and for one-half of the surplus to the board of supervisors, and pay the same into the county treasury; and the other half of such surplus shall be paid to the person earning the same, on his or her discharge from imprisonment. The keeper shall account to the court, whenever required, for all materials purchased and the disposition of the proceeds of the earnings of such offenders.³

¹ 1 R. S., 640, §§ 9, 10, 11.

² 1 R. S., 640, § 12.

³ Id., § 13.

SECTION XXI.

SPECIAL PROVISIONS APPLICABLE TO NEW YORK CITY.

Every person who shall threaten to abandon, or shall have actually abandoned his family, wife or child in the city of New York without adequate support, or in danger of becoming a burden upon the public, or who may neglect to provide according to his means for his family, or any member of said family, is declared by statute to be a disorderly person. All the provisions of law in relation to disorderly persons in the city of New York, apply to any person so offending, and any member of the defendant's family, of otherwise legal qualifications, is a competent witness to be examined; and in case the defendant offers himself to be examined under oath he is to be examined like any other witness.¹

In case of the conviction of any such person as a disorderly person, the magistrate convicting is to make an order, specifying a certain sum to be paid to the governors of the alms house department of the said city weekly, for and towards the support of the family of the defendant, and all the provisions of law in relation to the enforcement of orders for the support of bastard children in said city after conviction, are, as far as practicable, made to apply to the enforcement of such order, except that the order shall be for the stated period of one year, and that any appeal from or amendment of such order shall be exclusively for the action of the court of special sessions.²

No person who shall have been so convicted of being a disorderly person and committed to prison can be discharged therefrom without the written approval of the magistrate making the commitment, except he be discharged by a court of competent jurisdiction, or other legal proceedings for that purpose.³

The proceedings upon the forfeiture of any recognizance, under the provisions above referred to, is also made the subject of special legislation in the city of New York.⁴

In the city and county of New York, every person is deemed

¹ Laws 1860, ch. 508, p. 1007, § 3.

² Id., § 4.

³ Id., § 5.

⁴ Id., § 7, *et seq.*

guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place in said city and county, commit any of the following offences:

1. Every person who shall suffer to be at large any unmuzzled, ferocious or vicious dog.

2. Every common prostitute or night walker, loitering or being in any thoroughfare or public place, for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passers by.

3. Every person who shall use any threatening, abusive or insulting behavior, with intent to provoke a breach of peace, or whereby a breach of the peace may be occasioned.

Whenever it shall appear on oath of a credible witness, before any police justice in said city and county, that any person in said city and county has been guilty of any such disorderly conduct, as in the opinion of such magistrate, tends to a breach of the peace, the said magistrate may cause the person so complained of to be brought before him to answer such charge.¹

The provisions of the above mentioned act of 1860, section 20, do not repeal or supersede that of the act of 1833, chapter 11;² which provides that any conduct which, in the opinion of the magistrate, tends to a breach of the peace, may be punished as disorderly conduct.³

It is also declared to be disorderly conduct, subjecting the offender to a summary conviction, to drive or ride a horse through any lane, street, alley or public place within the lamp district of the city of New York, with a greater speed than five miles an hour.⁴

Upon a commitment for disorderly *conduct*, the making and filing of a record is not necessary, there being a distinction between commitment, under the statutes relating to the city of New York, for disorderly conduct, and under the Revised Statutes for being a disorderly person.⁵

It is not necessary that a commitment for disorderly conduct should set forth the particular act complained of. If the magis-

¹ Laws 1860, ch. 508, §§ 20, 21.

² Post.

³ The twelve commitments, 19 Abb., 394.

⁴ Laws 1833, ch. 11, § 5.

⁵ See the case of the twelve commitments, 19 Abb Pr., 394.

trate acts erroneously or upon insufficient evidence, the 'remedy is not by habeas corpus, but by certiorari. The commitment for disorderly conduct, until the party shall find security for his good behavior, without qualification of time, is void. It should be limited to a specified period not exceeding twelve months.¹

In cases of arrest for disorderly conduct in the city of New York, the police justice has power, in addition to holding the party to bail for good behavior, to impose a fine not exceeding ten dollars in each case, or to commit to the city prison not exceeding ten days, each day of imprisonment to be taken as a liquidation of one dollar of the fine.²

SECTION XXII.

BEGGARS AND VAGRANTS.

All idle persons, who, not having means to maintain themselves, live without employment; all 'persons wandering abroad and lodging in taverns, groceries, beer-houses, out-houses, market places, sheds or barns, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, passages, or other public places, to beg or receive alms, are deemed vagrants.³

This statute must be strictly construed, and a person must be shown to come exactly within its description. Proof that the prisoner was a common prostitute and idle person, does not authorize her commitment and conviction as a vagrant.⁴

It is the duty of every constable, or other peace officer, whenever required by any person to carry such vagrant before a justice of the peace of the same town, or before the mayor, recorder, or any one of the aldermen of the city in which such vagrant shall be, for the purpose of examination.⁵

If such justice, or other officer, be satisfied, by the confession

¹ 19 Abb., 394.

² Laws 1859, ch. 491, § 5.

³ 1 R. S., 633, § 1.

⁴ *Peo. v. Forbes*, 4 Park., 611; 11 Abb., 52; 19 How. 457. Vide *Gray's Case*, 11 Abb., 56; 4 Park., 616.

⁵ 1 R. S., 638, § 2.

of the offender, or by competent testimony, that such person is a vagrant, within the description aforesaid, he shall make up and sign a record of conviction thereof, which shall be filed in the office of the clerk of the county, and shall, by warrant under his hand, commit such vagrant, if he be not a notorious offender, and be a proper object for such relief, to the county poor-house, if there be one, or to the alms-house or poor-house of such town or city, for any time not exceeding six months, there to be kept at hard labor; or, if the offender be an improper person to be sent to the poor house, then he shall be committed to the bridewell or house of correction of such county or city, if there be one, and if none, to the common jail of such county, for a term not exceeding sixty days; there to be kept, if the justice think proper so to direct, upon bread and water only for such time as shall be directed, not exceeding one-half the time for which he shall be committed.¹

If any child shall be found begging for alms, or soliciting charity from door to door, or in any street, highway or public place of any city or town, any justice of the peace, on complaint and proof thereof, shall commit such child to the county house, if there be one, or to the alms house or other place provided for the support of the poor, there to be detained, kept, employed and instructed in such useful labor as such child shall be able to perform until discharged therefrom by the county superintendents of the poor, or bound out as an apprentice by them or by the commissioners of the alms house or the overseers of the poor.²

In the county of Ontario, when any justice of the peace shall be satisfied that any person brought before him is a vagrant, under the provisions of the Revised Statutes, or is an improper person to be sent to the poor house of said county, he shall sentence and commit such person to the work house in the county of Monroe, for a period of not less than sixty days nor more than ninety days.³

The police justices of the city of New York shall, in every case of commitment for vagrancy, file or cause to be filed in the office of the clerk of the court of general sessions of the peace,

¹ 1 R. S., 633, § 3. Vide 4 Park, 616-611; ante.

² 1 R. S., 633, § 4.

³ Laws 1862, ch. 217, p. 393.

in and for the city and county of New York, a record of the proceedings had before them, or either of them, and such record shall contain, as part thereof, the proofs or confession taken by such justice, together with the prisoner's examination. The form of this commitment is embodied in the statute.¹

The statute in relation to the city of New York, further provides that no person committed to the penitentiary work house or alms house as a vagrant, as above directed, shall, unless upon a writ of habeas corpus or certiorari, except upon an order of two of the governors of the alms house, be discharged before the expiration of the term for which he was so committed.²

By a subsequent act, the governors of the alms house, in the cases where they are empowered to discharge vagrants from the institution under their control, are forbidden to discharge any of said vagrants from custody before the expiration of their term of imprisonment, without the written consent of the committing magistrate in each case.³

The following persons are deemed vagrants in the city of New York, viz.: All persons who, being habitual drunkards, are destitute and without visible means of support, or who, being such drunkards, shall abandon, neglect or refuse to aid in the support of their families, who may be complained of by such families; all persons who have contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore them to health; all common prostitutes who have no lawful employment whereby to maintain themselves; all able bodied or sturdy beggars, who may apply for alms, or solicit charity; all persons wandering abroad, lodging in watch houses, out houses, market places, sheds, stables or uninhabited buildings, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, passages or other public places, to beg or receive alms within the said city. It is made the duty of every constable or other peace officer, whenever required by any person to carry, convey or conduct such vagrant before the mayor, recorder, or one of the aldermen, or special justices of the said city, for

¹ Laws 1855, ch. 268, § 1; 1 R. S., 633, § 11.

² Id., § 2; Id., § 12.

³ Laws 1859, ch. 491, § 5.

the purposes of examination. If such magistrates be satisfied by the confession of the offender, or competent testimony that such person is a vagrant, within the description aforesaid, he is to make up and sign a record of conviction thereof, which shall be filed in the office of the clerk of general sessions; and he shall, by warrant under his hand, commit such vagrant, if not a notorious offender, and he be a proper object of such relief, to the alms house of the said city, for any time not exceeding six months, there to be kept at hard labor; or if the offender be an improper person, to be sent to the alms house, then he is to be committed for the like time to the penitentiary.¹

SECTION XXIII.

PERSONS HAVING THEIR FACES PAINTED OR BEING OTHERWISE DISGUISED.

Every person who having his face painted, discolored, covered or concealed, or being otherwise disguised in a manner calculated to prevent him from being identified shall appear in any road or public highway, or in any field, lot, wood or inclosure, may be pursued and arrested in the manner hereinafter provided, and upon being brought before any judge or other officer hereinafter designated of the same county where he shall be arrested, and not giving a good account of himself, shall be deemed a vagrant within the purview of the provisions of the Revised Statutes mentioned in the last preceding section, and on conviction, as provided in said section, shall be committed to and imprisoned in the county jail of the county where such person shall be found, for a term not exceeding six months; and the following magistrates, justices of the supreme courts, judges of the superior court of law of the city and county of New York, the justices of the justices' court, and police justices for the said city and county, judges of county courts, mayors, recorders and aldermen of cities, police justices and justices of the peace appointed for any city or elected in any town, who are authorized to issue process for the apprehension of persons charged with any offence, are authorized and required to execute the powers and duties in

¹ Laws 1833, ch. 11, §§ 1, 2, 3.

relation to the offence herein named, which are conferred and imposed upon justices of the peace by the provisions of the statute mentioned in the last section in relation to beggars and vagrants.¹

Every sheriff, deputy sheriff, constable, marshal of a city, or other public peace officer, or other citizen of the county where such person or persons shall be found disguised as aforesaid, may, of his own authority and without process, arrest, secure and convey to any such magistrate residing in the county where such arrest shall be made, any person who shall be found having his face painted, discolored, covered or concealed, or being otherwise disguised as aforesaid, to be examined and proceeded against in the manner prescribed in the last section in relation to beggars and vagrants; and it is further made the duty of such officers to immediately pursue, arrest, secure and convey such persons before such magistrate.²

In the execution of such duties by such officer he is authorized to command as many male inhabitants of his county to assist him as he may think proper, and any inhabitant so commanded may be provided with such means and weapons as the officer giving such command shall designate.³ The refusal or neglect of a person so commanded to obey such command, without lawful cause, makes him guilty of a misdemeanor, and subjects him to fine and imprisonment.⁴

Power is also given by the same statute to any magistrate, to whom complaint shall be made of the violation of any of the above provisions, to issue a warrant under his hand for his arrest, and, if the name of such person be not known, it is sufficient to describe the offender by some fictitious name.⁵

¹ 1 R. S., 633, § 5; Laws 1845, ch. 3, § 1; 2 R. S., 704, § 1.

² Id., § 5; Id., § 2.

³ Id., § 7; Id., § 3.

⁴ Id., § 8; Id., § 4.

⁵ Id., 9; Id., 5.

SECTION XXIV.

PROFANE CURSING AND SWEARING.

Every person who shall profanely curse or swear shall forfeit one dollar for every offence; if the offence be committed in the presence of any justice of the peace, mayor, recorder, or aldermen of a city, while holding a court, a conviction of the offender shall be immediately made by such magistrate without any other proof whatever.¹

And if at any other time the offence be committed in the presence and hearing of such justice, mayor, recorder or alderman under such circumstances as, in the opinion of the magistrate, to amount to a gross violation of public decency, such magistrate may, in his discretion, convict the offender without other proof.²

If the offender do not forthwith pay the penalties incurred, with the costs, or give security for their payment within six days, he shall be committed by warrant to the common jail of the county for every offence, or for any number of offences whereof he was convicted at one and the same time, for not less than one day nor more than three days, there to be confined in a room separate from all other prisoners.³

SECTION XXV.

THE DISTURBANCE OF RELIGIOUS MEETINGS.

No person shall willfully disturb, interrupt or disquiet any assemblage of people, met for religious worship, by profane discourse, by rude and indecent behavior, or by making a noise, either within the place of worship, or so near it as to disturb the order and solemnity of the meeting; nor shall any person within two miles of the place, where any religious society shall be actually assembled for religious worship, expose to sale or gift any ardent or distilled liquors, or keep open any huckster shop, in any other place, inn, store or grocery, than such as shall have been duly licensed, and in which such person shall have usually

¹ 1 R. S., 674, § 55.

² Id., § 56.

³ Id., § 57.

resided, or carried on business; nor shall any person, within the distance aforesaid, exhibit any shows or plays, unless the same shall have been duly licensed by the proper authority; nor shall any person, within the distance aforesaid, promote, aid or be engaged in any racing of animals, within the distance aforesaid, or in any gaming of any description; nor shall any person obstruct the full passage of any highway, to any place of public worship, within the distance aforesaid.¹

Whoever shall violate either of the provisions of the statute above referred to, may be convicted summarily before any justice of the peace of the county, or any mayor, recorder, alderman or other magistrate of any city, where the offence shall be committed, and on such conviction, shall forfeit a sum not exceeding twenty-five dollars, for the benefit of the poor of the county.²

It is by statute, made the duty of all sheriffs and their deputies, coroners, marshals, constables and other peace officers, who may be present at the meeting of any assembly for religious worship, which shall be interrupted or disturbed in the manner above provided, to apprehend the offender, and take him before some justice of the peace, or other officer, authorized to convict as aforesaid, to be proceeded against according to law.³

All judges, mayors, recorders, aldermen and justices of the peace, within their respective jurisdictions, upon their own view of any person offending against the provisions above mentioned, may order the offender into the custody of any officer above specified, or of any official member of the church or society so assembled and disturbed, for safe keeping, until he shall be let to bail, or a trial for such offence be had.⁴

If any person convicted of any of the offences above prohibited, shall not immediately pay the penalty incurred, with the costs of the conviction, or give security, to the satisfaction of the officer before whom the conviction shall be had, for the payment of the said penalty and costs, within twenty days thereafter, he shall be committed, by warrant, to the common jail of the county until the same be paid, or for such term, not exceeding thirty days, as shall be specified in the warrant.⁵

¹ 1 R. S., 674., § 58.

² 1 R. S., 674, § 59.

³ 1 R. S., 675, § 60.

⁴ 1 R. S., 675, § 61.

⁵ 1 R. S., 675, § 62.

It has been held, under this section of the statute, that security given for the payment of the fine, in the name of the clerk of the court in which the conviction is had, is valid, and that it need not be in the name of the people.¹

By the act of 1834, it is provided that it shall and may be lawful, for any person who may be complained of for a violation of any of the provisions of the statute above mentioned, before the court shall proceed to investigate the merits of the cause, to demand of such court that he may be tried by a jury. Upon such demand, it shall be the duty of such court to issue a venire to any constable of the county, or marshal of the city, where the offence is to be tried, commanding such officer to summon the same number of jurors, and in the same manner as is provided for the summoning of jurors before courts of special sessions. The said court shall proceed to empanel a jury for the trial of said cause, in the same manner, and shall be subject to all the rules and regulations prescribed in the act providing for trials by jury in courts of special sessions.²

In addition to the costs allowed by law for prosecution, under the provisions of the statute above referred to, all the costs consequent upon a trial by jury shall be added and paid by the party offending, in case of conviction, and shall be the same as is allowed by law in civil cases.³

SECTION XXVI.

THE OBSERVANCE OF SUNDAY.

Among the provisions of the Revised Statutes in which summary convictions are authorized to be had, are those in relation to the observance of Sunday.⁴ The main sections of the article are given below.⁵

The first section of the article provides that certain writs,

¹ 19 Wend., 545.

² Laws 1834, ch. 78, § 1; 1 R. S., 675, § 63.

³ Id., § 2; Id., § 64.

⁴ R. S., art. 7, tit. 8, ch. 20, part 1.

⁵ For a discussion of the origin and history of the legal sanctions of the Sabbath vide *People v. Hoym*, 20 How. Pr. R., 445; also, 8 Cow., 27.

process and proceedings of courts or officers of justice shall not be served or executed upon Sunday.¹

The second section of the article is as follows :

There shall be no shooting, hunting, fishing, sporting, playing, horse racing, gaming, frequenting of tippling houses, or any unlawful exercises or pastimes on the first day of the week called Sunday; nor shall any person travel on that day, unless in cases of necessity or charity, or in going to or returning from some church or place of worship within the distance of twenty miles, or in going for medical aid or medicines, or in visiting the sick and returning, or in carrying the mail of the United States, or in going express by order of some public officer, or in removing his family or household furniture when such removal was commenced on some other day; nor shall there be any servile laboring or working on that day, excepting works of necessity and charity, unless done by some person who uniformly keeps the last day of the week, called Saturday, as holy time, and does not work or labor on that day, and whose labor shall not disturb other persons in their observance of the first day of the week as holy time. Every person, being of the age of fourteen years, shall forfeit one dollar for each offence.²

The next section declares that no person shall expose to sale any wares, merchandise, fruit, herbs, goods, or chattels on Sunday, except meats, milk and fish, which may be sold at any time before nine o'clock in the morning; and the articles so exposed shall be forfeited to the use of the poor, and may be seized by virtue of a warrant for that purpose, which any justice of the peace of the county, or mayor, recorder or alderman of the city is authorized to issue upon conviction of the offender.³

If property is exposed to imminent danger, it is not a violation of the statute prohibiting labor on the Sabbath to preserve it on Sunday and remove it to a place of safety.⁴

¹ 1 R. S., 675, § 65; vide 3 John., 257; 15 id., 177; 12 id., 178; 1 Cow., 75; 8 id., 27; 12 Wend., 59; 8 Barb., 384.

² 1 R. S., 676, § 66.

³ 1 R. S., 676, § 67.

⁴ *Parmales v. Wilks*, 22 Barb., 540; vide 1 Hill, 76.

SECTION XXVII.

GENERAL PROVISIONS TO ENFORCE THE PROHIBITIONS OF THE
THREE LAST SECTIONS.

Whenever complaint shall be made to any justice of the peace, mayor, recorder or alderman of a violation of either the provisions contained in the three last sections, relative to profane swearing, the disturbance of religious meetings, or the observance of Sunday, or when any of such violations shall happen in the presence of such officer, he shall cause the offender to be brought before him, and shall proceed summarily to inquire into the facts, and, if the person charged be found guilty, a record of his conviction shall be made and signed by such officer before issuing any process to enforce the same; which conviction shall be final, and shall not be re-examined upon the merits in any court.¹ No prosecution shall be maintained for any of the violations specified in the preceding section of the statute, unless the same be instituted by the actual issuing of process to apprehend the offender, or by his actual appearance to answer the complaint within twenty days next after the offence committed.²

Upon a conviction being had for any of the offences in the last three sections specified, where no other special provision is made for the collection of the penalties incurred, the magistrate, before whom the same is made, shall issue an execution to any constable of the county, commanding him to levy the said penalties and the costs of the conviction by distress and sale of the goods and chattels of the offender, and in case sufficient goods and chattels cannot be found, then to commit such offender to such common jail of the county, for such time as shall be specified in such execution, not less than one day nor more than three days.³

Within thirty days after any such conviction shall be had, the magistrate making the same shall cause to be filed in the office of the clerk of the county a certificate of such conviction, briefly

¹ 1 R. S., 677, § 72; amended, in case of disturbance of religious meetings, so as to allow jury, vide ante.

² 1 R. S., 677, § 73.

³ 1 R. S., 677, § 74.

stating the offence charged, the conviction and judgment thereon, and if any fine has been collected, the amount thereof, and to whom paid.¹

In all prosecutions for any of the offences specified in the three last sections, the like fees shall be allowed and taken as in civil suits before justices of the peace, which shall in no case exceed five dollars, and be paid by the party offending, over and above the penalties incurred. But in case of the imprisonment of the offender, no charges or fees shall be allowed.²

SECTION XXVIII.

RACING OF ANIMALS.

It is made the duty of all officers concerned in the administration of justice to attend at the place where they shall know, or be informed that any race is about to be run contrary to the provisions of law, and there give notice of the illegality thereof, and endeavor to prevent such race by dispersing the persons collected for the purpose of attending the same, and by all other ways and means in their power. Upon their own view of any persons offending against the provisions of the statute in relation to the racing of animals, as well as upon the testimony of others, such judges and justices shall issue warrants for the immediate apprehension of the persons so offending, to the end that they may be compelled to enter into recognizances, with sufficient sureties, for their good behavior, and for their appearance at some proper court to answer for said offences.³

SECTION XXIX.

HAWKERS AND PEDDLERS.

Any citizen may apprehend and detain any person who shall be found trading as a hawker or peddler without licensese, or contrary to the terms of his license, or who shall refuse to produce a license, in violation of the provisions of the Revised

¹ 1 R. S., 677, § 75.

² Id., § 76.

³ 1 R. S., 672, § 50.

Statutes, and may convey the offender before any justice of the peace in the town or county in which he shall be apprehended. It is made the duty of the overseers of the poor of the several towns in this State to enforce the provisions of the law in that respect, whenever any violation thereof within their respective towns shall come to their knowledge.¹ It is made the duty of such justice, if a sufficient license to authorize such trading be not produced to him, and the fact of trading be proved to him, either by the confession of the person apprehended or the oath of competent witnesses, to convict the offender of such offences against the provisions of the statute as shall be so confessed or proved; and to issue his warrant on such conviction, directed to some constable of the county in which the conviction shall be had, commanding such constable to cause the sum of twenty-five dollars, with costs, not to exceed five dollars, to be forthwith levied by distress and sale at public vendue of the goods, wares and merchandise of the offender; the moneys collected on such warrant, exclusive of the costs, are to be paid by the justice to the overseers of the town in which the offence shall have been committed.²

SECTION XXX.

CRIMINAL CONTEMPTS.

In the following cases, and no others, a justice of the peace may punish, as for a criminal contempt, persons guilty of the following acts: 1. Disorderly, contemptuous or insolent behavior towards such justice while engaged in the trial of a cause, or in the rendering of any judgment, or in any judicial proceedings which shall tend to interrupt such proceedings, or to impair the respect due to his authority. 2. Any breach of the peace, noise or other disturbance, tending to interrupt the official proceedings of a justice. 3. Resistance willfully offered by any person in the presence of a justice, to the execution of any lawful order or process made or issued by him. Punishment for contempts in the foregoing cases may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding five

¹ 1 R. S., 576, § 8; Laws 1840, ch. 70, § 3.

² 1 R. S., 576, § 9.

days, or both, in the discretion of the justice; but no person shall remain imprisoned for the non-payment of such fine more than ten days. Neither shall any person be punished for a contempt before a justice, until an opportunity shall have been given him to be heard in his defence; and for that purpose, a justice may issue a warrant to bring the offender before him. Upon convicting any person of a contempt, the justice shall make up a record of such conviction, stating therein the particular circumstances of the offence, and the judgment rendered thereon, which shall be subscribed by him, and filed in the office of the county clerk, within ten days after its date. The warrant of commitment for any contempt, shall set forth the particular circumstances of the offence, or it shall be void.¹

Also when a witness attending before any justice in any cause, shall refuse to be sworn in any form prescribed by law, or to answer any pertinent and proper question, and the party at whose instance he attended, shall make oath that the testimony of such witness is so far material, that without it he cannot safely proceed in the trial of such cause, such justice may, by warrant, commit such witness to the jail of the county. Such warrant shall specify the cause for which the same was issued, and if it be for refusing to answer any question, such question shall be specified therein, and such witness shall be closely confined, pursuant to such warrant, until he submit to be sworn, or to answer, as the case may be.²

The judgment of a court having competent jurisdiction, cannot be reviewed on *habeas corpus* in cases of commitment for contempt as a witness, in refusing to answer questions relating to a criminal complaint; if the decision of the court be erroneous, the remedy is by certiorari or writ of error. The officer issuing the writ may, however, inquire whether the process of commitment be valid on its face, and also, whether any cause has arisen since the commitment, for putting an end to the imprisonment; and he may also inquire whether the committing magistrate had jurisdiction, and this, notwithstanding a recital of the necessary jurisdictional facts in the commitment.³

As a general rule, the propriety of a commitment for contempt,

¹ 2 R. S., 273, § 199, *et seq.*

² 2 R. S., 273, §§ 204, 205.

³ *Peo. v. Cassels*, 5 Hill, 164.

is not examinable in any other court than the one by which it was awarded. This rule is especially applicable on habeas corpus. But the rule is subject to the qualification that the conduct charged as constituting the contempt, must be such that some degree of delinquency or misbehavior can be predicated of it, for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged so.¹

SECTION XXXI.

GAMBLING.

If an affidavit shall be filed with the magistrate or police justice of any town or city, before whom complaint shall have been made of an offence against any of the provisions of the act to suppress gambling, stating that the affiant has reason to believe and does believe that the person so charged in such complaint has upon his person, or at any other place named in such affidavit, any specified articles of personal property, or any gambling table, device or apparatus, or any lottery policies, public or private, the discovery of which might lead to establish the truth of such charge, the said magistrate or justice may, in his discretion, by warrant command the officer, who is authorized to arrest the person so charged, to make diligent search for such property and table, device or apparatus, and if found, to bring the same before such magistrate or justice; and the officer so seizing shall deliver the same to the magistrate or justice before whom he takes the same, who shall retain possession of said property and be responsible therefor until the discharge or commitment, or letting to bail of the person so charged; and in case of such commitment or letting to bail of the person so charged, such officer shall retain such property, subject to the order of the court before which such offender may be required to appear, until his discharge or conviction; and in case of the conviction of such person, the gambling table, device or apparatus shall be destroyed, and the household property and other fixtures belonging to such gambling place shall be held liable to be sold to pay

¹ *Peo. v. Kelly*, 24 N. Y., 74.

any judgment and costs which may be rendered against such person, and after the payment of such judgment and costs the surplus, if any, shall be paid into the treasury of the county where such prosecution shall take place; and in the case of the discharge of such person by the magistrate or court, the officer having such property in his custody shall, on demand, deliver it to such person.¹ It is lawful for any justice of the peace, police justice, chief magistrate of any municipal corporation or judge of any court of record, upon complaint upon oath that any gambling tables, apparatus, establishment, or device is kept by any person for the purpose of being used to win or gain money or other property, or by any other person, or any lottery policies of any lotteries, to issue his warrant commanding any sheriff or constable to whom the same shall be directed, within the proper jurisdiction, after demanding entrance, to break open and enter any house or place wherein such gambling table, establishment, apparatus or device shall be kept, and to seize and deliver the same to the mayor of the city, president of the village, supervisor of the town, or clerk of the county where such seizure shall be made, who shall keep the same until the term of the court at which the case shall be tried, and the court shall then, if there be no necessity of keeping the property to be produced on the trial of an offender against this act, have a jury sworn to try the fact whether the property taken was or is used for gambling, and if the finding shall be that the property was used for gambling the court shall order such property to be broken up and sold by the sheriff of the county, and the proceeds shall, after the payment of costs, go into the treasury of the county for the use of the common schools therein, in the manner as is provided in said act.²

SECTION XXXII.

OTHER SUMMARY CONVICTIONS.

In addition to those offences which subject the offender to fine and imprisonment by summary convictions, there are a variety of other cases mentioned in the statute where the offender is sub-

¹ Laws 1851, ch. 504, § 3, p. 943; 1 B. S., 664, § 24.

² Id., § 4; Id., § 25.

jected to the payment of a penalty, among which may be mentioned the enactments against jugglers and the exhibitors of shows,¹ certain disorderly practices on public occasions and holidays, and in taverns, vessels, and canal boats;² also the statutes against raffling³ and betting and gaming,⁴ and the act against absconding parents and husbands, authorizing the seizure of their property;⁵ also the provisions of the excise laws.⁶

But a person accused of being intoxicated in a public place, under chapter 628, Laws of 1857, cannot be summarily tried before a justice of the peace, unless he so elects, but is entitled to give bail for his appearance before the next court of oyer and terminer or of sessions.⁷

¹ 1 R. S., 660, § 1.

² *Id.*, § 3.

³ 1 R. S., 665, §§ 22, 23.

⁴ 1 R. S., 662, §§ 12, 14, 15.

⁵ 1 R. S., 615, §§ 8, 9, *et seq.*

⁶ Laws 1857, ch. 628, amended 1858, ch. 143; 1 R. S., 677, § 1.

⁷ *Hill v. Peo.*, 20 N. Y. (6 Smith), 363.

CHAPTER X.

OF THE ARREST AND EXAMINATION OF OFFENDERS, THEIR COMMITMENT FOR TRIAL AND LETTING THEM TO BAIL, AND TRIALS IN COURTS OF SPECIAL SESSIONS.

It is designed in this chapter to treat of the proceedings had in indictable offences, prior to their presentment to the grand jury, and also of the trial of offences in a court of special sessions, without a common law jury, and without recourse had to an indictment against the accused.

For the purpose of convenience the subjects treated of in this chapter will be discussed in the following order:

Section one. The proceedings from the complaint until the return of the warrant of arrest.

Section two. Proceedings subsequent to the return of the warrant, where the offence charged is not triable in a court of special sessions.

Section three. Proceedings subsequent to the return of the warrant, where the offence charged is triable before a court of special sessions.

SECTION I.

THE PROCEEDINGS FROM THE COMPLAINT UNTIL THE RETURN OF THE WARRANT OF ARREST.

GENERAL REMARKS.

Section I.—COMPLAINT TO BE MADE.

II.—PUBLIC OFFICERS AUTHORIZED TO ISSUE WARRANTS FOR THE APPREHENSION OF PERSONS CHARGED WITH OFFENCES.

III.—DUTY OF MAGISTRATE UPON COMPLAINT BEING MADE.

IV.—WARRANT TO BE ISSUED.

V.—REQUISITES OF WARRANT.

VI.—WARRANTS, WHERE EXECUTED.

VII.—DEFENDANT, HOW ARRESTED WHEN HE IS IN ANOTHER COUNTY, AND THE WARRANT IS ISSUED BY A JUSTICE OR ALDERMAN.

VIII.—DUTY OF THE OFFICER WHEN HE ARRESTS THE ACCUSED UPON SUCH ENDORSED WARRANT IN ANOTHER COUNTY.

IX.—PROCEEDINGS UPON THE RETURN OF THE WARRANT.

§ 1. COMPLAINT TO BE MADE.

The initiatory step to be taken by any person desirous of having process issued for the apprehension of a person charged with any offence, is to make a complaint concerning the commis-

sion of the offence, and the grounds or reasons for suspecting or believing the accused to have been concerned in the perpetration of the same.

The magistrate should not, however, entertain complaints from persons disqualified from being witnesses, as from persons who are deranged in mind, in a state of intoxication¹ or otherwise disqualified from being witnesses.

There are two distinct stages in criminal proceedings at which the complaint may be made. First, it may be made before any of the officers named in the next section, and this is usually done in cases where the magistrate has power to try the offence alleged to have been committed, and also in cases where the magistrate does not possess that power, and where a trial cannot be had without an indictment duly found against the accused; but it is deemed expedient to have him arrested at once, and either committed to prison or let to bail, to await the action of the grand jury in finding an indictment against him. It is of complaints, arrests, examinations and trials where the complaint has been made under the circumstances above named that we propose to speak at present. The other stage of the proceedings, at which the complaint is made, is in cases where the accused cannot be tried without an indictment having been found against him, and the prosecutor does not see fit to have any preliminary arrest made, as stated in this chapter, which is usually done to secure the attendance of the prisoner at his trial upon the indictment (which is necessary in all cases where corporal punishment is to be inflicted),² but waives all preliminary proceedings, and makes his complaint, in the first instance, by making his accusation to the grand jury. This latter complaint is termed preferring a charge for an indictment, and will be found treated of in a subsequent chapter.³

§ 2. PUBLIC OFFICERS AUTHORIZED TO ISSUE PROCESS FOR THE APPREHENSION OF PERSONS CHARGED WITH OFFENCES.

The following persons respectively shall have power to issue process for the apprehension of persons charged with any offence, and to execute the powers and duties in relation to the arrest

¹ 16 John., 143; 10 John., 362.

² Post.

³ Post.

and examination of offenders, their commitment for trial and the letting of them to bail; namely, justices of the supreme court, judges of the superior court of law of the city and county of New York, judges of county courts, mayors, recorders and aldermen of cities, the justices of the justices' courts and police justices in the city of New York, and justices of the peace and police justices appointed for any city or elected in any town, and no other magistrates shall have authority to execute the above mentioned powers.¹

Although the judges of the superior court of the city of New York are clothed with authority as criminal magistrates, it is not any part of their ordinary duty to attend to the arrest and examination of persons charged with criminal offences, and it must be an extreme case, either in the nature of the charge or the difficulty of procuring the action of the regular criminal judges, to warrant the judges of that court in devoting their time to it.²

§ 3. DUTY OF MAGISTRATE UPON COMPLAINT BEING MADE.

Whenever complaint shall be made to any of the magistrates mentioned in section two of this chapter, that a criminal offence has been committed, it shall be the duty of such magistrate to examine on oath the complainant, and any witnesses who may be produced by him.³

The statute above referred to, does not require that the complaint should be in writing, or that the examination of the complainant and his witnesses therein referred to, should be in writing.⁴ It is, however, better that the complaint should be reduced to writing, for the following, among other considerations: It will insure greater system and accuracy in the subsequent proceedings; enabling the justice, in case the complainant or any of the witnesses are prosecuted for their doings in the matter, to show distinctly what they testify to; and further, if the justice himself is prosecuted, it will facilitate his defence, by enabling him to exhibit at once, an information, on oath authorizing the warrant, and giving him jurisdiction.⁵ If the complaint is made in writ-

¹ 2 R. S., 706, § 1.

² *Matter of Hayward*, 1 Sandf. 701. ³ 2 R. S., 706, § 2.

⁴ 2 Park., 34; 21 Wend., 552; 5 Barb., 465; 15 Id., 153.

⁵ Barb. Cr. L., 2d ed., 519; 2 Stark. Ev., 429, n. a; 2 Strange, 710; 8 East. R., 113; 2 T. R., 225.

ing, it becomes the duty of the magistrate to file and preserve the same; and upon the demand of any person affected by the warrant, he shall exhibit the affidavit or complaint upon which the warrant is issued, and such person, by himself or by another, is permitted to take a copy thereof.¹ The oath should be administered to the prosecutor and his witnesses previous to the commencement of the examination; and in taking down the testimony, the magistrate should pursue, as near as may be, the language of the witnesses.²

The reason why the oath is required before the examination, is in order that the witness shall be under the solemn obligation of an oath while he is giving his evidence. Otherwise, he may inadvertently, or perhaps willfully state some particulars erroneously, which, when afterwards put to the test of an oath, a sense of shame may prevent him from retracting.³

The complaint, if taken in writing, should be read by the complainant and his witnesses, or, if he be unable to read, it should be carefully read over and explained to them, and an opportunity offered them to make any corrections in it that may be necessary.⁴ In relation to the amount and character of the evidence which is requisite to authorize the magistrate to issue a warrant, it is said it is fitting to examine upon oath the party requiring a warrant, as well as to ascertain that there is a felony or other crime committed, without which no warrant should be granted, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed.⁵ The Supreme Court of this State have held that, to authorize a magistrate to take the first step towards the arrest of a person charged with the commission of a crime, viz., to examine a complainant on oath, a simple complaint that an offence has been committed is all that is necessary, and all that need be proved by the examination of the complainant to authorize further action on the part of the magistrate, is that it shall furnish good grounds to believe that further investigation will lead to the discovery of crime.⁶

¹ Laws 1860, ch. 95.

² 4 Dow. & Ryl., 734; 1 Nun v. Walsh, 168; 8 Dow. & Ryl., 8.

³ 1 Nun. v. Walsh, 168.

⁴ 1 Nun. & Walsh, 182.

⁵ 4 Blac. Com., 290; 2 Hale P. C., 108.

⁶ Peo. v. Hicks, 15 Barb., 153.

If neither the complaint for larceny nor the warrant state the value of the property stolen, and there be no mention of the place where the offence arose, a conviction by a court of special sessions is erroneous.¹

§ 4. WARRANT TO BE ISSUED.

The complaint having been made, and the complainant, with any witnesses produced by him, having been examined by the magistrate, the next proceeding is to cause the arrest of the person accused of the crime, in order that such further proceedings may be taken as will lead to his conviction and punishment. The statute provides that if it shall appear from such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation and commanding the officer to whom it shall be directed forthwith to take the person accused of having committed such offence, and bring him before such magistrate to be dealt with according to law.²

There is a further section of the statute, providing that whenever any criminal warrant or process shall be issued by any magistrate residing out of the town or city wherein the offence shall be committed, it shall authorize the officer executing the same to carry the person charged with an offence before any magistrate resident and being in the town or city wherein such offence shall have been committed, to be proceeded against according to the provisions of the statute, but the magistrate issuing such warrant or process shall not lose any jurisdiction over the trial and proceedings against any such persons by reason of anything contained in the statute.³

§ 5. REQUISITES OF WARRANT.

At the common law it was said that a seal was necessary,⁴ but by the express provision of our statute above referred to the warrant may be either with or without seal.⁵ The preamble to a

¹ Howell v. Peo., 2 Hill, 281.

² 2 R. S., 706, § 3.

³ 2 R. S., 706, § 12.

⁴ 4 Black. Com., 290; 2 Hawk., P. C., ch. 13, § 21; 1 Hale's P. C., 577.

⁵ 2 R. S., 706, § 3.

warrant constitutes a part of it.¹ The warrant should not be general to apprehend all persons suspected, but should direct the officer to apprehend some particular individual; for a general warrant to apprehend all persons suspected or guilty of a particular crime, without naming or describing any particular person, is illegal and void for uncertainty, for it is not fit that the officer should be left to the officer to judge of the ground of suspicion. The magistrate is to judge of this, and it is his duty to give plain and precise directions to the person who is to execute the warrant.² At the common law it was deemed rather discretionary than necessary to set out the accusation in the warrant, but the practice of doing so was generally recommended.³ A statute, however, requires that the warrant should recite the accusation made by the complaint.⁴ All the statutes require that the warrant shall recite the accusation, and the accused need only charge that a criminal offence has been committed. If, therefore, it charges a criminal offence generally, viz, theft, larceny, it is sufficient to authorize the issuing of a warrant, though the accusation omits to state the value of the property. The recital in such warrant of the complaint is presumptive evidence that such complaint has been made. An omission in a warrant of arrest which is merely clerical and is apparent and does not mislead any one nor prejudice the defendant, will not render such warrant invalid.⁵

If it do not recite the offence charged, the officer issuing it is a trespasser.⁶

A warrant which charges the defendant with having sold beer does not, on its face, charge an offence against a statute bidding the sale of beer.⁷

The warrant should not be left in blank, to be afterwards filled up by the officer or party. And if the name of the party or the officer be inserted without authority after the issuing of

¹ *Harshaw v. Crow*, 11 Iredell, 240.

² 4 Blac. Com., 291; 1 Hale's P. C., 580; 1 Chit. Cr. L., 41, 42; 1 N. & W. 190; 3 Burr, 1766.

³ 1 Chit. Cr. L., 41; 2 Hale's P. C., 111; *Ib.*, 580; *Cro. Jac.*, 81; 2 W. 158.

⁴ 2 R. S., 706, § 3.

⁵ *Payne v. Barnes*, 5 Wend., 465.

⁶ *Blythe v. Tompkins*, 2 Abb., 468.

⁷ *Peo. v. Hart*, 24 How., 289.

warrant, the arrest will be illegal, and the person executing it will not be protected in proceeding under it.¹

But it may be filled by the justice himself, after he has signed it, before he delivers it over to the officer.²

Where a magistrate designated an officer to execute a warrant issued to arrest a defendant and bring him before the court to give sureties of the peace, it was held that if such officer's name was erased, and another person's name, who was not a sworn officer, was inserted by the prosecutor, an arrest made by the person thus substituted was illegal and void, and was not a justification in case he was sued for assault and battery and false imprisonment, but was matter to offer in mitigation of damages.³

The name of the person to be apprehended should be accurately stated, if known, and must not be left in blank to be filled up afterwards;⁴ and a description, thus, A and his associate, is void as to the latter.⁵

If, however, the name of the party be unknown, the warrant may be issued against him by the best description the nature of the case will allow, as "the body of a man, whose name is unknown, but whose person is well known, and who is employed as the driver of cattle, wears a white hat, and has lost his right eye."⁶

It has, however, been held that a warrant to apprehend "— Hood, (omitting his christian name,) of B., in the parish of F., by whatsoever name he may be called or known, the son of Samuel Hood, to answer, &c.," was defective for omitting the christian name and assigning no reason for the omission, nor giving any distinguishing particulars of the individual.⁷

So, also, is a warrant against "the author, printer and publisher" of a certain paper, void,⁸ for the warrant must carefully identify the person intended to be arrested. Thus a warrant against "John Doe, the person carrying off the cannon" intended for Levi Mead, who was, when it was issued, in the act of carry-

¹ 2 Hale, 114; 1 Nun. & W., 195.

² 8 T. R., 455; 1 East. P. C., 324.

³ Wells v. Jackson, 3 Mumf., 458.

⁴ 1 Chit. Cr. L., 39; 2 Hale P. C., 114; Fost., 312.

⁵ Wells v. Jackson, 3 Mumf., 458.

⁶ 1 Chit. Cr. L., 39-40; 1 Hale P. C., 577.

⁷ Rex v. Hood, 1 M. & M., 281.

⁸ Wells v. Jackson, *supra*.

ing off a cannon, and for whom it was intended. Being arrested under it, it was held, that Mead might maintain trespass against the persons concerned in the arrest. The arrest of a person by a wrong name cannot be justified, though he was the person intended, unless it be shown that he was as well known by one name as the other.¹

The above decisions were made prior to the passage of an act to amend certain provisions of the Revised Statutes, by which it is enacted that when the name of any defendant shall not be known to the plaintiff he may be described in the summons or warrant by a fictitious name, and if a plea in abatement be interposed by such defendant, the justice, before whom the suit is pending, shall amend the proceedings according to the truth of the matter, and shall thereafter proceed therein in like manner as if the defendant had been sued by his right name.²

The warrant issued on a complaint for felony recited a complaint against John R. M., and commanded the officer to arrest said William M., held not sufficient to authorize the arrest of John R.³

In regard to the direction of the warrant at the common law, it might be directed to some indifferent person by name, who is not an officer.⁴ Our statute gives no direction as to whom the warrant should be directed, and, in the absence of any express legislation to the contrary, it is presumed the doctrine of the common law will apply; and, inasmuch as private persons can make arrests in certain cases without warrant, there is no good reason why they should not be specially deputed to make arrest under a warrant.⁵

It is the usual practice, however, to direct the warrant to any constable of the county, although it may be directed to the sheriff exclusively, or to the constables of the county or of a particular town, or to the sheriff and at the same time to any constable.⁶ The constable has the same right to execute process in every

¹ *Mead v. Hows, et al.*, 7 Cow., 332; 4 Wend. 555; 6 Cow., 456; 2 Town., 400; 1 M. & Grang, 775; 8 N. H., 406; 2 East., 328.

² Laws 1830, p. 395, § 282; *Gurnsey v. Knight*, 9 Wend., 319.

³ 28 Barb., 630.

⁴ 1 Chit. Cr. L., 38; 1 Hale P. C., 581; 2 Id., 110; 2 Hawk. P. C., ch. 13, § 27; 1 Salk., 347.

⁵ 3 Wend., 350.

⁶ 1 East. P. C., 320; *Addis.*, 376; 1 Chit. Cr. L., 49; 1 Salk., 381.

town in the county as in that in which he was chosen and where he resides, and in this respect his territorial jurisdiction is co-extensive with that of the sheriff.¹ The warrant should also command the officer, to whom it is directed, forthwith to take the person accused of having committed such offence, and to bring him before the magistrate who issued it, to be dealt with according to law.² It need not be made returnable at any particular time, and continues in force until it is fully executed and obeyed.³ Where a justice of the peace issued a warrant for the arrest of an individual upon a criminal charge late on Saturday night, with an indorsement thereon directing that the accused should be committed until the following Monday for examination, and the constable arrested the accused in the same evening and committed him to jail without first bringing him before the justice, held that the justice had exceeded his authority, and was liable to trespass.⁴ It should also be under the hand of the magistrate who issued it,⁵ and should set forth the day and year wherein it was issued,⁶ and may be issued either in the name of the people or of the magistrate.⁷ It ought also to show the county wherein it was made, either in the body of the warrant or in the margin.⁸ A warrant was in the following form: "To," etc. "This is to require you and each of you to bring before me the body of S, of whom it is complained by C that said S did willfully break and destroy the certain water pipe in H street. Given," &c. It was held sufficient under section three of the statute. The warrant, though very limited, is sufficient if it recite the substance of the section.⁹

§ 6. WARRANTS, WHERE EXECUTED.

Warrants issued by either of the officers enumerated in section two of this chapter, may be executed in any part of the State,

¹ *Peo. v. Garey*, 6 Cow., 648.

² 2 R. S., 706, § 3.

³ *Peake's Rep.*, 234; *Davis J.*, 27.

⁴ *Pratt v. Hill*, 16 Barb., 303.

⁵ 2 R. S., 706, § 3.

⁶ 2 Hawk. P. C., ch. 13, § 22; 2 Hale P. C., 111; 1 Chit. Cr. L., 38, 39.

⁷ *Dickinson v. Rogers*, 19 John., 279; 1 Chit. Cr. L., 39; 2 Hawk., P. C., ch. 13, § 24; 4 Burns J., 353.

⁸ 2 Hawk. P. C., ch. 13, § 23.

⁹ *Sleight v. Ogle*, 4 E. D. Smith, 445; Vide 5 Barb. 465; 2 Abb., 468; 5 Wend., 530; 28 Barb., 630.

except such as are issued by any justice in New York city, or by any alderman or justice of the peace. Warrants issued by any such assistant justice, alderman or justice, shall not be executed out of the county in which they are officers, unless indorsed in the manner hereinafter specified.¹

When an officer shall have arrested any prisoner on a criminal charge in any county, he may carry such prisoner through such parts of any other county or counties as shall be in the ordinary route of travel, from the place where such prisoner shall have been arrested, to the place where he is to be conveyed, and delivered under the process by which such arrest shall have been made, and such conveyance shall not be deemed an escape; and while passing through such other county or counties, the officers having such prisoner in their charge, are not liable to arrest on civil process, and they have the like power to require any citizen to aid in securing such prisoner, and to retake him if he escape, as if they were in their own county; and a refusal or neglect to render such aid, is an offence in the same manner as if they were officers of the county where such aid was required.²

§ 7. DEFENDANT, HOW ARRESTED WHEN HE IS IN ANOTHER COUNTY AND THE WARRANT IS ISSUED BY A JUSTICE OR ALDERMAN.

In case the warrant should be issued by any justice in New York city, or an assistant justice, or by any alderman or justice of the peace, and the person against whom any such warrant shall be issued, shall escape, or be in any other county out of the jurisdiction of such alderman or justice, the officer holding the warrant should go before one of the magistrates named in the second section of this chapter, within the county where such offender may be or shall be suspected to be, and it then becomes the duty of such justice or other magistrate, upon proof of the handwriting of the magistrate issuing the warrant, to indorse his name upon the same; and thereupon, the person bringing the warrant or any other officer to whom it may have been directed, may arrest the offender in the county where the warrant was so indorsed.³

It is provided by statute that no magistrate shall be liable to any indictment, action of trespass or other action, for having

¹ 2 R. S., 707, § 4, post.

² 2 R. S., 749, §§ 53, 54.

³ 2 R. S., 707, §§ 4, 5; 4 Park., Cr. R., 45.

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indorsed any warrant pursuant to the above mentioned provisions, although it should afterwards appear that such warrant was illegally or improperly issued.¹

The statute requires that the magistrate should simply indorse his name upon the warrant. It is advisable, however, that the magistrate should make an indorsement upon the warrant, reciting that proof had been made to him on oath; that the name of the justice subscribed to the warrant is in the handwriting of the person issuing the same, and authorizing the execution of such warrant within his county, and it is usually the practice not only to require such proof, but to make such indorsement.²

§ 8 DUTY OF THE OFFICER WHEN HE ARRESTS THE ACCUSED UPON SUCH INDORSED WARRANT IN ANOTHER COUNTY.

When the warrant was issued by a justice or alderman, and the officer suspecting or knowing the accused to be in a county out of the jurisdiction of such justice or alderman, has procured the warrant to be indorsed in such other county as mentioned in the last section, the officer thereupon proceeds to arrest the defendant. The general rules in relation to the time and manner of making the arrest are applicable in this case, the same as if the warrant were to be served in the county where issued.³ The disposition to be made of the prisoner after the arrest has been made, varies, however, according to the offence charged in the warrant, whether it be a felony or misdemeanor.

Thus, if the offence charged in the warrant be punishable with death or with imprisonment in a State prison, the officer making the arrest is to convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof;⁴ that is in cases where no provision is otherwise made before the magistrate who issued the warrant, or if he be absent or his office be vacant, before the nearest magistrate in the same county, to whom the officer is also to deliver the warrant, by virtue of which the arrest was made, with a proper return thereon, signed by such officer or person making the arrest.⁵ Under the provi-

¹ 2 R. S., 707, § 6.

² Barb. Cr. L., 2d ed., 529.

³ Vide page 71, ante.

⁴ 2 R. S., 707, § 11.

⁵ 2 R. S., 707, § 12.

sions of the statute above cited, another magistrate cannot take cognizance of a case without proof, by the officer's return, or by oath that the magistrate who issued it was absent.¹ In cases where the warrant shall have been issued by a magistrate residing out of the town or city where the offence shall have been committed, and such warrant authorizes the officer executing the same, to carry the person charged with the offence, before a magistrate resident, and being in the town or city where such offence was committed, the prisoner should be taken by the officer before such last mentioned officer named in the warrant, to whom the warrant, by virtue of which the arrest was made, should also be delivered by the officer or person making the arrest, with his return indorsed thereon and signed by him.² But in case the offence charged in the warrant be not punishable with death, or by imprisonment in a State prison, a different course is to be pursued in case the person arrested should require it: thus, in such cases, if the person arrested require to be brought before a justice of the county in which he shall have been arrested, it becomes the duty of the officer or person arresting him, to carry the prisoner before a magistrate of such county;³ when, if the offence charged in the warrant be not punishable with death or by imprisonment in the State prison, such magistrate may take from the prisoner a recognizance, with sufficient sureties for his appearance at the next court having cognizance of the offence, to be held in the county where the offence shall be alleged to have been committed.⁴ The magistrate taking such bail, shall certify on the warrant, the fact of his having let the defendant to bail, and shall deliver the warrant, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which such prisoner shall be recognized to appear.⁵ If, however, the prisoner when arrested should not require to be brought before a magistrate in the county where arrested, or should make such request, and the magistrate should refuse to let him to bail, or if such person should neglect to give

¹ 17 Wend., 211.

² 2 R. S., 708, §§ 12, 13.

³ 2 R. S., 207, § 7.

⁴ 2 R. S., 707, § 8.

⁵ 2 R. S., 707, § 9.

bail as above provided, then the officer or person having him in charge, is to convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, as prescribed in cases where the offence charged in the warrant was punishable with death or imprisonment in the State prison, and as above mentioned¹ in this section, and is in like manner to deliver to such magistrate the warrant, by virtue of which the arrest was made, with a proper return indorsed thereon, and signed by the officer or person making the arrest.

Previous to the Revised Statutes the constable had a right to detain a defendant, for a reasonable time, while making a *bona fide* attempt to find a justice to hear the cause; the period now is fixed at twelve hours.²

Whether the arrest is made with or without a warrant, the officer must take the prisoner without any unnecessary delay before the magistrate, in order, where there is a warrant, that the party may have a speedy examination if he desires it, and in the case of an arrest without warrant, that the officer may take such proof as may be offered, or, if the circumstances will justify it, hold the suspected party for further examination.³

§ 9. PROCEEDINGS UPON THE RETURN OF THE WARRANT.

In cases where the prisoner is brought before a magistrate of the county where the warrant was issued, the officer or person making the arrest is to deliver the warrant, together with a proper return thereon indorsed and signed by him, to such magistrate.⁴ But in cases where the prisoner has been arrested in another county, and has been bailed in such county, as above specified, then the warrant, together with such magistrate's certificate of having let the defendant to bail indorsed thereon, and the recognizance taken by him are to be without unnecessary delay, delivered by the officer or other person who had charge of the prisoner to the clerk of the court in which such prisoner shall have been recognized to appear.⁵

The prisoner having been arrested by the officer, and the war-

¹ Ante; 2 R. S., 707, § 10.

² Arnold v. Stevens, 10 Wend., 514.

³ Matter of Henry, 29 How., 185; 16 Barb., 307.

⁴ 2 R. S., 708, § 12.

⁵ 2 R. S., 707, § 9.

rant, by virtue of which the arrest was made, having been delivered to the magistrate by whom it was issued, or, in case of his absence or a vacancy in his office, to the nearest magistrate in the same county, with a proper return indorsed thereon, and signed by the officer or person making the arrest, several different proceedings, according to the circumstances of the case and the election of the prisoner, may be taken by the magistrate.

Thus, in cases not triable before a court of special sessions, the justice may examine the complainant and the witnesses for the prosecution, and also the prisoner, and upon such examination may discharge the prisoner, or he may hold him to await the action of the grand jury, either by committing him to jail or by letting the accused to bail in cases where bail can be taken by such magistrate. There are exceptions to the cases in which the examination of the prisoner is required to be taken, which will be noticed hereafter.

In cases where the offence charged in the warrant is triable before a court of special sessions, the prisoner may elect to be tried before such court, or may give bail to await the action of the grand jury. Warrants are generally issued in the cases, mentioned in this chapter by a justice of the peace, and the justice before whom the warrant is made returnable in such cases, constitutes the court of special sessions himself in most of the counties of the State. There are, however, in the cities of New York and Albany, and in some other parts of the State, courts of sessions composed of other officers than justices of the peace.¹ These various proceedings will be taken up and discussed in detail. We will first examine the proceedings to be taken in cases where a court of special sessions has no jurisdiction to try the offence charged; and next, the proceedings which are had where a court of special sessions has jurisdiction to try the offence charged in the warrant under which the accused was arrested.

¹ Ante chap. 3.

SECTION II.

PROCEEDINGS SUBSEQUENT TO THE RETURN OF THE WARRANT, WHERE THE OFFENCE CHARGED IS NOT TRIABLE IN A COURT OF SPECIAL SESSIONS.

GENERAL REMARKS.

Section X.—THE COMPLAINANT AND HIS WITNESSES TO BE EXAMINED.

XI.—PRISONER TO BE EXAMINED.

XII.—PRISONER TO BE ALLOWED COUNSEL.

XIII.—CAUTION TO THE PRISONER BY THE MAGISTRATE.

XIV.—PRISONER'S ANSWERS TO BE IN WRITING.

XV.—PRISONER'S WITNESSES TO BE EXAMINED.

XVI.—SEPARATION OF THE WITNESSES.

XVII.—EVIDENCE TO BE REDUCED TO WRITING.

XVIII.—PRISONER, WHEN TO BE DISCHARGED.

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XX.—WHEN PRISONER TO BE COMMITTED TO PRISON OR LET TO BAIL.

XXI.—OF THE COMMITMENT OF THE ACCUSED TO PRISON.

XXII.—OF THE OFFICERS AND COURTS AUTHORIZED TO LET TO BAIL BEFORE INDICTMENT FOUND.

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XXIV.—RECOGNIZANCES TAKEN OUT OF COURT TO BE FILED.

XXV.—RETURNING RECOGNIZANCES AND EXAMINATIONS, AND HOW COMPELLED.

XXVI.—POWER OF ASSOCIATING ANOTHER MAGISTRATE WITH THE ONE BEFORE WHOM COMPLAINT WAS MADE.

XXVII.—SPECIAL PROVISIONS IN RELATION TO THE ARREST OF FUGITIVES FROM JUSTICE WHO HAVE FLED FROM OTHER STATES AND TERRITORIES.

XXVIII.—COMPROMISING OFFENCES BEFORE INDICTMENT.

The offences which are triable in a court of special sessions will be found referred to in the next general subdivision.¹ We have thus far traced the proceedings, previous to the indictment, from the complaint originally made to the return of the warrant and presence of the prisoner before the magistrate. We will now consider what disposition is made by the magistrate of the accused, where he is charged with the commission of an offence not triable in a court of special sessions,

§ 10. THE COMPLAINANT AND HIS WITNESSES TO BE EXAMINED.

The magistrate, before whom such accused shall be brought, shall proceed, as soon as may be, to examine the complainant and all the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent.²

¹ Post.

² 2 R. S., 708, § 13.

Although an offender is entitled to the benefit of all the forms and provisions contained in the statute in relation to his arrest, examination and order for commitment before he can be compelled to enter into recognizance to appear and answer, yet he may waive those forms, and when charged with an offence may prefer to give bail at once, without waiting for an arrest or an examination according to the forms prescribed in the statute. This is not unfrequently done, and no doubt can be entertained of the validity of a recognizance taken under such circumstances.¹

And where a defendant instead of being examined gives recognizance for his appearance, he is presumed to have waived an examination, and the recognizance need not show probable cause for believing the accused guilty, or that he has made any adjudication in the matter.² With regard to the time within which the examination is to be had, the language of our statute is, as soon as may be. If from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, the justice, before whom the accused shall appear or may be brought, may remand the accused for such time as by said justice in his discretion shall appear reasonable.³ Where the magistrate finds it necessary to inquire further into the case before he discharges or commits the prisoner, it seems that he may, from time to time, verbally remand him into custody, and a written warrant or authority is unnecessary.⁴ Where the temporary commitment for further examination was in writing, upon a charge of larceny, it was held not necessary to state whether it was for grand or petit larceny, or what articles are alleged to have been stolen.⁵

The justice has no authority to order a person accused of a criminal offence to be committed, until a subsequent day for examination, without the accused being first brought before him.⁶ What is a reasonable time, is a mixed question of law and fact, depending upon the circumstances of the case, and the judgment

¹ *Champlain v. The Peo.*, 2 N. Y., (2 Com.), 85.

² *Id.*

³ 1 Arch. Cr. Pl., 37; 1 Hale, 585, 586; 5 Cowen, 273; 1 Chit. Cr. Law, 72 -

⁴ 1 Hale, 585; 2 *Id.*, 120; Bac. Abr. Trespass, D., 3; Moore, 408; Dick. J., Exn., 3; *Peo. v. Smith*, 1 Whee. Cr. Cases, 56.

⁵ *Peo. v. Nash*, 5 Park., 473.

⁶ *Pratt v. Hill*, 16 Barb., 303.

of the committing magistrate is not conclusive of that question.¹ It was formerly supposed that the law intends three days to be a sufficient time for the examination, and that a magistrate could not justify the detainer of a party sixteen or twenty days for that purpose.² In England, by statute, the time is determined to be not exceeding eight clear days.³ Mr. CHITTY points out the rule to be that the time for the full investigation of the case and final decision of the magistrate, should depend upon the circumstances of each case, and that, as a general rule, he ought not to be restricted to any particular time, for either the prisoner or the accuser may be unable to bring forward his evidence immediately, and the compelling of the magistrate to discharge or commit within a particular time, might be prejudicial to the purposes of justice.⁴ It will be for the jury, if an action is brought against the magistrate, to say what were the facts, and the judge will direct them upon those facts whether the time was reasonable or not, as a matter of law.⁵ Instead of detaining the prisoner in custody during the time for which he will be so remanded, it has often been the practice for the magistrate to discharge him upon his entering into a recognizance conditioned for his appearance at the time and place designated for the continuance of such examination, although it is denied upon good authority that the magistrate has any power whatever to exercise such authority.⁶ The statute does not say that this examination shall be a public one. It is sometimes necessary in order to prevent the imprudent disclosure of evidence or for other reasons, that the proceedings should be conducted in private, as in the instance of offences committed by numbers in conjunction. When it is expedient to examine each separately, it may be equally expedient that no one of the confederates shall be informed of what has been disclosed during the examination of any other, which object might be frustrated, if a stranger had a right to be present, who might convey information to the rest of what passed.⁷

¹ 5 Mun. & Ryl., 59. See 10 Barn. & Cr., 28, S. C.

² Cro. Eliz., 829; Hawk. B. 2, C. 16, § 12; 1 Hale, 585-586; 2 Ib., 120.

³ 11 and 12 Vict. C., 42, § 21.

⁴ 1 Chit. Cr. L., 73; 5 Man. v. Ryl., 58; per Bailey J.

⁵ 4 Car. & P., 134, and note a; 5 Man. & Ryl., 60, per Parke J.; 10 Barn. & Cress., 38.

⁶ Report Code, Cr. Pro., Assem. Doc. 150, 1855, p. 96.

⁷ Barb. Cr. L., 556; 1 Barn. & Cress., 37; 2 D. & R., 86; 1 Dow. & Ryl., 178-187.

The magistrate, having authority to examine into the nature and circumstances of a criminal charge against an offender, has also a power, as incident to his authority, to bring before him all persons who appear from the oath of the complainant, or from the magistrate's own knowledge to be material witnesses for the prosecution, and for this purpose may issue his subpoena, directed to a proper officer, requiring him to cause such witnesses to come before him and give evidence.¹ The method of enforcing the attendance of the witnesses is in the usual way as upon other trials, by process of subpoena and attachment. It is provided by statute that whenever any magistrate shall issue any subpoena in any criminal proceeding or trial, he shall indorse upon the back thereof a memorandum, showing whether the same was issued for the people or the prisoner, and every officer, or other person, who shall insert the names of witnesses in a subpoena, issued for the people, intended for the prisoner, with intent thereby to deceive any person, or to obtain any pay as for services in subpoenaing witnesses, shall be deemed guilty of a misdemeanor.²

The ordinary practice in relation to examinations of this nature, and procuring the attendance of witnesses where the defendant does not waive an examination, is upon the return of the warrant to the magistrate, for the magistrate to assign some early day, generally the next morning of the next day, at the opening of the court for an examination of the defendant, and at the same time to acquaint the accused thereof, and direct the officer to notify the complainant, and request him to come to the magistrate at once, and procure subpoenas for the attendance of his witnesses at the time set down for the examination. Of course the lapse of time for which the examination is set down must depend upon the circumstances of each case, and the facility with which the attendance of the complainant and his witnesses can be procured. The defendant at the same time is either remanded into custody to secure his appearance, or in the discretion of the court is permitted to enter into a recognizance for his appearance at the time the examination is set down for.³ The defendant may, however, as above stated, waive any examination, and enter into a recognizance conditioned in the same manner as if an examina-

¹ Davis J., 59; 1 Chit. Cr. L., 76; Arch. Cr. Pl., 40, note.

² 2 R. S., 710, § 40.

³ See ante, page 189.

tion had been had, and it appeared to the magistrate that an offence had been committed, and that there was probable cause to believe the prisoner to be guilty thereof.¹ Justices of the peace, upon examinations before them upon complaints made before them in criminal cases, have no power to commit persons for refusing to be sworn as witnesses.²

§ 11. PRISONER TO BE EXAMINED.

The complainant and witnesses for the prosecution having been examined, the magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath, and before it is commenced the prisoner is to be informed of the charge made against him,³ but whenever a prisoner charged with a misdemeanor shall be brought before a magistrate, he is not required to take the examination of such prisoner except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner.⁴

The witnesses produced on the part either of the prosecution or of the prisoner, are not to be present at the examination of the prisoner.⁵

If there be more than one person accused, it is of evident importance that all of them should be examined apart, in order that an opportunity may be afforded of detecting any variations in their story. In order also to prevent any communication between them previous to the examination, it will be prudent to give special directions to the keepers to confine them in different parts of the prison.⁶ If the examination of the prisoner be taken upon oath, it will not be receivable in evidence.⁷

With respect to the manner of taking the examination, it is to be observed that the very essence of it consists in being free and voluntary, and that the ingenious and often complicated questions of a man in an official station, to a prisoner vibrating between hope and fear, whose mind is in a state of perturbation, are not

¹ Post.

² *Peo. v. Webster*, 3 Park., 503.

³ 2 R. S., 708, § 14.

⁴ *Id.*, § 22; *Laws 1830*, ch. 320, § 60.

⁵ 2 R. S., 708, § 18.

⁶ *Dick, J., Examination*, III.

⁷ *Ros. Cr. Ev.*, 6th ed., 55; 1 Stark. N. P., 242; 7 C. & P., 177; 9 C. & P., 124.

calculated to obtain that object. The examination should, therefore, assume the narrative form. The prisoner should be allowed to tell his story free from any restraint, and not by subtle and intricate questions involve him in a greater crime than he was supposed to have committed. Questions of course may be asked, but they should be for the development of truth, and not for the purpose of eliciting a contradiction.¹

§ 12. PRISONER TO BE ALLOWED COUNSEL.

The prisoner is to be allowed a reasonable time to send for and advise with counsel, and if desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner.²

§ 13. CAUTION TO THE PRISONER BY MAGISTRATE.

At the commencement of the examination the prisoner is to be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him.³ The above is a provision of our statutes, and it is the practice to generally caution the prisoner that he is not bound to accuse himself, and that any admission he may make may be produced against him on his trial.⁴ The English statute requires the magistrate to say to the prisoner words to the like effect: "Having heard the evidence, do you wish to say anything to the charge? You are not obliged to say anything unless you desire to do so; but whatever you do say will be taken down in writing, and may be given in evidence against you upon your trial."⁵

§ 14. PRISONER'S ANSWER TO BE IN WRITING.

The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate or under his direction; they shall be read to the prisoner, who may correct or add to

¹ *Peo. v. Smith*, 1 Wheel. Cr. Cases, 58, note.

² 2 R. S., 708, § 14.

³ 2 R. S., 708, § 15.

⁴ *Rex v. Green*, 5 Carr. & P., 312.

⁵ 11 & 12 Vict., ch. 42, § 16; Vide *Peo. v. Hendrickson*, 1 Park., 416; *Peo. v. McMahon*, 2 Id., 669.

them, and when conformable to what he declares is the truth they are to be certified and signed by the magistrate.¹

The examination of a prisoner, when reduced into writing, ought to be read over to him, and tendered to him for his signature, but it is not necessary in order to make it evidence that it should be signed by him.² The magistrate cannot be too careful in the observance of the sections of the statute applicable to the examination of the prisoner himself. If properly taken it is often of great service to the district attorney, upon the trial of the accused upon an indictment, as evidence against the prisoner;³ and while a voluntary statement, made by the prisoner himself and admissible as evidence against him, may often supply the necessary link in the chain of evidence necessary to secure a conviction, the magistrate should not forget that the prisoner has still rights as a citizen, and carefully refrain from any improper influence, either by threat, promise or misrepresentation; for however slight the inducement may have been, a confession so obtained cannot be received in evidence on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest than from a sense of guilt.⁴

§ 15. PRISONER'S WITNESSES TO BE EXAMINED.

After the examination of the prisoner is completed, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.⁵

Upon the request of the defendant, the magistrate has the same power to bring before him any witnesses whose testimony may be material in his behalf that he has to cause the attendance of witnesses for the complainant, and their attendance may be enforced in like manner by process of subpoena and attachment.⁶

§ 16. SEPARATION OF THE WITNESSES.

During the progress of the examination, while any witness is

¹ 2 R. S., 708, § 16.

² *Peo. v. Johnson*, 1 Wh. Cr. Cases, 193; 2 Leach, 625.

³ *Ros. Cr. Ev.*, 6th ed., 60, 61.

⁴ 1 Leach, 263, 291, 386; 2 Hale, 284; 4 Blac. Com., 357; *Phil. Ev.*, 50, 51, 52; 2 *Hawk. C.*, 46, § 36; 10 *Pick.*, 477; 1 *Ry. & M. C. C.*, 27, 186, 432; 4 *C. & P.*, 550; *Id.*, 543; 6 *Id.*, 177; 5 *Id.*, 535. ⁵ 2 R. S., 708, § 17.

⁶ 12 *Wend.*, 344; 1 *Chit. Cr. L.*, 76; *Wallace Rep.*, 23.

under examination, the magistrate has power to exclude from the place in which such examination is had all the witnesses who have not been examined, and may cause the witnesses to be kept separate, and prevented from conversing with each other until they shall have been examined.¹

This was also the rule at common law, and its propriety will be at once observed as a method of detecting and preventing not only conspiracies against the prisoner, but efforts by like conspiracy to secure his release, and thus obstructing the due administration of public justice.

§ 17. EVIDENCE TO BE REDUCED TO WRITING.

The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively.²

§ 18. PRISONER, WHEN TO BE DISCHARGED.

The examination having been concluded by the magistrate, if, upon an examination of the whole matter, it shall appear to the magistrate either that no offence has been committed by any person, or that there is no probable cause for charging the prisoner therewith, he shall discharge the prisoner.³

This was the common law rule, for if, upon the examination of the whole matter, it manifestly appeared either that no such offence was committed by any person, or that the suspicion entertained of the prisoner was wholly groundless, it was lawful for the magistrate totally to discharge him, without even requiring bail.⁴

To authorize a commitment, the same proof is not required which would be necessary to convict a person on the trial in chief, but the committing magistrate will require that probable cause be shown. Probable cause is a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged. When such cause is shown, it can be done away only by its appearing that no such crime has been committed, or that the suspicion entertained of the prisoner is wholly

¹ 2 R. S., 708, § 18.

² 2 R. S., 709, § 19.

³ 2 R. S., 709, § 20.

⁴ 1 Chit. Cr. L., 89.

groundless.¹ Upon this examination or primary hearing, the magistrate is required to act judicially in the exercise of his understanding and judgment, with a proper consideration of all the evidence adduced in such examination, and of the law relative to the case. To the extent of this inquiry the magistrate is the judge of the law and the facts. On the supposition that certain facts have been proved as alleged against the defendant, he may decide that they do not constitute any offence at law, and in forming his judgment he may thus determine the construction and meaning of a statute in respect to its application to the particular case before him. His first duty is to see that the offence charged is an offence contrary to the statute or common law; and secondly, that the facts present a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the party charged.² A prudent magistrate, however, will take care that an uncertain doubt on his mind as to a point of law, should not operate to an absolute discharge of the accused, so as perhaps to cause the escape of a criminal, but he will rather so order his proceeding in the case that the matter may be adjudicated upon by a higher tribunal in the ordinary forms of law.³ It is the duty of the magistrate in this stage of the proceedings to ascertain first, whether the crime alleged has been committed, and whether committed in the manner, and with the circumstances alleged; and secondly, if the crime has been so committed, whether there is a reasonable ground to believe that the party accused may have committed it, so as to demand a further inquiry, and for which the party should be sent to stand his trial upon the charge preferred. And as on the one hand the magistrate would act contrary to the principles of reason and justice, and in violation of his duty, if he were to commit the party to prison against the clear conviction of his own understanding, and the obvious and inevitable conclusion of common sense, yet on the other hand he is bound not to discharge the prisoner unless he is perfectly satisfied that there is *no sufficient ground for judicial inquiry*.⁴

¹ U. S. v. Burr, Sergeant's Const. Law, 242.

² 1 Arch. Cr. Pl., § 45, note; Recorder Vaux's Decisions, Phil., p. 94.

³ 1 Arch. Cr. Pl., § 45, note.

⁴ Barb. Cr. L., 2d ed., 565; 1 N. & Walsh, 369; 1 Dow. & Ry., 90; 2 Burn., 121.

§ 19. RECOGNIZING PROSECUTOR AND WITNESSES TO APPEAR.

If upon the conclusion of the examination before the magistrate it shall appear that an offence has been committed, and there is probable cause to believe the prisoner to be guilty thereof, the magistrate shall bind by recognizance the prosecutor and all the material witnesses against the prisoner, to appear and testify at the next court having cognizance of the offence, and in which the prisoner may be indicted.¹

And whenever such magistrate shall be satisfied, by due proof, that there is good reason to believe that any such witness will not fulfill the conditions of such recognizance unless security be required, he may order such witnesses to enter into a recognizance, with such sureties as he shall deem meet, for his appearance at such court; so also Indians and married women being material witnesses may in like manner be required to procure sureties for their appearance at such court.²

If any witness so required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it is the duty of the magistrate to commit him to prison until he shall comply with such order or be otherwise discharged according to law.³

The recognizance is an obligation of record entered into before a magistrate duly authorized for that purpose, with a condition to appear at some court named therein, and it should contain an acknowledgment of indebtedness to the people, and mention the offence charged.⁴

A recognizance, taken by a justice of the peace for the appearance of the accused to answer a criminal charge, must require his attendance at the next criminal court having cognizance of the offence.

Thus, where the recognizance was conditioned for the appearance of the accused to answer a criminal charge at the next court of oyer and terminer to be held in the county in June then next, and it appeared that a court of sessions was appointed to be held and was in fact held in the same county in May of the same year, at which a grand jury was required to and did attend, and was

¹ 2 R. S., 709, § 21.

² 2 R. S., 709, §§ 23, 24.

³ Id. § 25.

⁴ 3 Binn., 431; 6 Hill, 506.

sworn and heard complaints, such court of sessions having cognizance of the offence charged, the recognizance was held void.¹

Where the accused has waived an examination, the recognizance need not show on its face that there is probable cause for believing the accused guilty of the offence charged, or that the magistrate has made any adjudication in the matter.²

The recognizance may be either to appear and answer the particular charge set forth, or to appear and answer what shall be objected against the party.³

§ 20. WHEN PRISONER TO BE COMMITTED TO PRISON OR LET TO BAIL.

In case it shall appear from the examination that an offence has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate is either to commit the accused to prison or let him to bail.

The provision of the statute is as follows: If the offence with which the prisoner be charged be bailable by a justice of the peace or an alderman of a city, and the prisoner offer sufficient bail, such bail may be taken and the prisoner discharged. If no bail be offered, or the offence be not bailable by a justice or an alderman, the prisoner shall be committed to prison.⁴

A justice of the peace or an alderman of a city has power to let to bail, in all cases of misdemeanor, and in all cases of felony where the imprisonment in the State prison cannot exceed five years, before indictment found.⁵

At this stage of the proceedings, the magistrate having decided not to discharge the defendant, one of two things happens; he is either sent to prison, where he remains until the next session of the grand jury, or he is released upon bail to answer such indictment as the grand jury may find against him. In case the accused should be able to furnish sufficient and satisfactory bail for his appearance at the next court having cognizance of the offence, but the committing magistrate has not power to let him to bail, he should at once make application to an officer authorized to let him to bail and secure his release from confinement.

¹ *Peo. v. Mack*, 1 Park., 567; Vide *Peo. v. Millis*, 5 Barb., 511.

² *Champlain v. The Peo.*, 2 N. Y. (2 Com.), 82.

³ *Peo. v. Keober*, 7 Hill, 39.

⁴ 2 R. S., 709, § 26.

⁵ 2 R. S., 710, § 31.

Upon making a verbal application to such officer, it is usually the practice for the judge, before whom the application is pending, to send a written order to the sheriff, requesting him to bring the prisoner up to be bailed. In case the judge or court to whom such application is made should decline to make such order, or the sheriff or jailor refuse to execute it, the course to be pursued by the defendant is to make an application for a writ of habeas corpus, to be brought up and let to bail by some officer having authority to take bail.

It is usually the practice on such occasions, in case the charge is of a serious nature, or the accused a notorious offender, for the officer by whom the bail is taken to notify the district attorney of the time and place at which the bail is to be taken, in order that he may be present and see that the amount of the bail is sufficient, and examine the sureties in regard to their responsibility.

§ 21. OF THE COMMITMENT OF THE ACCUSED TO PRISON.

Though the warrant of commitment be defective, the court, upon the return of a writ of habeas corpus, will not discharge the prisoner finally for that reason; but if a crime be made out upon the deposition, the course is to discharge *pro forma*, but remand under a special rule.¹ The warrant of commitment or mittimus, as it is commonly called, should possess the following requisites: It should describe the prisoner by his name, if known, and if not known, then it may be sufficient to describe the person by his age, stature, complexion, color of hair and the like, and to add that he refuses to tell his name.² It may be in the name of the people or that of the justice awarding it, but the latter is the most usual.³ The statute is silent in respect to whether the mittimus should have a seal or not. At the common law it is necessary that it should be in writing, under the hand and seal of the magistrate, and show the time and place of making it.⁴ The term warrant implies a seal, except in cases where a seal has been dispensed with.⁵

¹ *Ex parte*, Taylor, 5 Cow., 39. Contains form of rule.

² 1 Hale, 577; Burns J., Commit.

³ 1 Chit. Cr. L., 109; 2 Hawk. P. C., 16, § 14.

⁴ 1 Chit. Cr. L., 109; 2 Hawk., ch. 16, § 13; 2 Hale, 122.

⁵ *Smith v. Randall*, 3 Hill, 495.

It should be directed to the sheriff or any constable, and to the jailor and keeper of the prison, and be generally to carry the party to prison; and when thus directed, it commands the former to convey the prisoner into the custody of the latter, and the latter to receive and keep him.¹ It should also set forth the particular species of crime alleged against the party, with convenient certainty.² It ought also to state that the party has been charged upon oath.³ So it should point out the place of imprisonment, and not merely direct that the party should be taken to prison.⁴ A warrant of commitment is irregular if it do not state that the magistrate has determined that there was probable cause for believing the prisoner to be guilty of the offence charged against him.⁵

The statute simply requires that the defendant should be committed to prison. Where there is but one common jail in the county, that is the prison in which the accused should be detained. Where there are more than one jail in a county, used for the confinement of criminals, as in the city of New York and half-shire counties, the mittimus should direct to which of them the defendant is to be committed.⁶

The conclusion of the mittimus by common law was "until he should be discharged by due course of law;"⁷ although it is said to be proper, when the accused is committed for want of sureties in a bailable offence, to direct the jailor to keep the prisoner in his said custody for want of sureties, or until he shall be discharged by due course of law.⁸

Upon the delivery of the prisoner to the keeper of the jail, the officer should have with him his mittimus, as an authority for detaining him, whereupon the sheriff or keeper of the jail delivers to the officer his receipt for the prisoner, which is commonly called a jail receipt.⁹ If the jailor refuses to receive the prisoner,

¹ 2 Strange, 934; 1 Ld. Raym., 424; 2 Hawk., ch. 16, § 13; Burns J., Commit.

² 1 Hale, 584; 2 Hawk., ch. 16, § 16; 2 Hale, 122; 11 St. Tr., 304-318; 14 East. Rep., 70; 3 Cranch, 448.

³ Barb. Cr. L., 2d ed., 569.

⁴ 1 Ld. Raym., 424; 2 Strange, 934.

⁵ Peo. v. Rhoner, 4 Park., 166.

⁶ Barb. Cr. L., 2d ed., 567.

⁷ 2 Hawk., ch. 16, § 18; 2 Hale, 123.

⁸ Barb. Cr. L., 2d ed., 572; 2 Hawk., ch. 16, § 15.

⁹ 2 Hawk., ch. 16, § 9.

it is said the officer may in such case detain the prisoner in his own house.¹

In case the prisoner either cannot or does not wish to give bail, if he is advised that the commitment is illegal, his proper remedy is by writ of habeas corpus. It has been held that in a commitment before indictment the whole question of guilt or innocence is open for examination on the return of the writ of habeas corpus, and the inquiry is not necessarily confined to the examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on a habeas corpus are in the nature of an appeal from the decision of the committing magistrate.² And it is further said that on return to a writ of habeas corpus, issued to inquire into the cause of detention after commitment by a magistrate, and before indictment, additional proof may be received by the judge for the purpose of enabling him to decide upon the legality of the detention.³

§ 22. OF THE OFFICERS AND COURTS AUTHORIZED TO LET TO BAIL BEFORE INDICTMENT FOUND.

The court of oyer and terminer, held in any county, has power to let to bail any person committed before indictment found upon any charge whatever.

The court of sessions of any county, has power to let to bail persons, committed to the prison of such county, before indictment found for any offence triable in such court.

The officers, before whom persons charged with crime shall be brought, have power to bail as follows before indictment found.⁴

1. A justice of the supreme court, in all cases.
2. A judge of the county courts, in all cases triable in a court of sessions.
3. A justice of the peace or alderman of a city, and in the city of New York a special justice or an assistant justice, in all cases of misdemeanor, and in all cases of felony where the imprisonment in a State prison cannot exceed five years.
4. The police justices in the city of New York, in all cases

¹ 1 Chit. Cr. L., 117; 1 T. R., 60.

² *Peo. v. Martin*, 1 Park. Cr. R., 187.

³ *Peo. v. Richardson*, 4 Park. Cr. R., 656.

⁴ 2 R. S., 728, §§ 59, 60; *Id.*, 710, §§ 31, etc.

where a judge of a court of general sessions in the said city is authorized by law to let to bail.¹

A prisoner arrested by virtue of an indorsed warrant, as heretofore mentioned, for an offence punishable by imprisonment in a State prison, cannot be let to bail in the county where the arrest is made, but must be taken back to the county in which the warrant was issued.²

By an act of the Legislature, when any court of oyer and terminer, court of sessions or superior court shall be sitting in the county of Erie, no judge at chambers is authorized, without the written consent of the district attorney, to bail any prisoner in jail; or, without such consent, to bail any prisoner in jail if an application in behalf of such prisoner shall have been made to any such court for that purpose and such application shall have been denied, or if the party shall have had an opportunity to apply to such court and shall have neglected to make such application.³

Whenever any magistrate in the city and county of New York shall make an order, requiring any person to enter into a recognizance for his appearance at any court in said city and county, the said magistrate may authorize any other magistrate of said city and county to let said person to bail, either before or after commitment, and any recognizance so taken is of the same power, force and effect as if taken by the magistrate making the order.⁴

Whenever any magistrate in the city of New York shall bind over or commit any person, for his appearance at the court of special sessions, to answer any criminal charge or other misconduct, he may also bind over the witnesses for the prosecution to appear and be examined in said court, in the same manner that any magistrate may bind over by recognizance witnesses to appear and be examined in the court of general sessions of the peace.⁵

¹ 2 R. S., 710, §§ 31, 32, 33.

² *Clark v. Cleveland*, 6 Hill, 344; *Peo. v. Chapman*, 30 How. Pr., 202.

³ *Laws* 1846, ch. 142, § 4; 2 R. S., 710, § 38.

⁴ *Laws* 1860, ch. 508, § 19, p. 1007.

⁵ *Laws* 1860, ch. 508, § 17.

§ 23. OF THE SUFFICIENCY AND AMOUNT OF BAIL TAKEN, THE DISCRETION OF THE JUDGES TO LET TO BAIL, THE SURRENDER OF THE BAIL, SUBSTANCE OF THE RECOGNIZANCE, ETC., ETC.

The general rules applicable to the above subjects are the same which apply in like cases in courts of record after indictment found. They will be found discussed in the subsequent chapter, in relation to the practice and proceedings had upon the trial of indictments in courts of oyer and terminer.¹

The old doctrine that the personal character of the persons offered for bail might be taken into consideration in determining the adequacy of the sureties, may be considered as overruled. The sureties, if otherwise sufficient, ought not to be refused on account of the personal character or opinion of the party proposed.² Neither is it any objection that the persons proposed as bail in a criminal case are indemnified by or on behalf of the prisoners.³

§ 24. RECOGNIZANCES TAKEN OUT OF COURT TO BE FILED.

Whenever any prisoner shall be let to bail by any officer out of court, such officer is required to immediately cause the recognizance taken by him to be filed with the clerk of the county in which the party bailed was imprisoned, and whenever any person shall be let to bail by any court other than that in which the offence is triable, it shall be the duty of the clerk of the court by which the prisoner was bailed immediately to transmit the recognizance taken by such court to the clerk of the county in which the party bailed was imprisoned.⁴

By a subsequent statute it is further provided, that every recognizance taken by any court, or by any magistrate, coroner, or other officer, to appear and answer at any court, or by any magistrate, coroner, or other officer, and the complaint, inquisition, affidavits, and other papers upon which such recognizance is founded, shall be filed in the office of the clerk of the court, at which the party is thereby required to appear, within ten days after the same is so taken.⁵

¹ Vide post.

² *Rex v. Badger*, 4 Queen's Bench R., 468; 1 Lead Cr. Cases, 236.

³ *Reg. v. Broome*, 18 Law Times R., 14.

⁴ 2 R. S., 710, §§ 34, 35.

⁵ Laws 1861, ch. 333, § 2, p. 781.

§ 25. RETURNING EXAMINATIONS AND RECOGNIZANCES AND HOW COMPELLED.

All examinations and recognizances taken pursuant to the provisions of the statute, upon the examination herein mentioned, are to be certified by the magistrate taking the same to the court at which the witnesses are bound to appear on the first day of the sitting thereof.¹ Although the statute does not require the examinations and recognizances to be certified to the court above, until the first day of the term, it is advisable that the magistrate should file them with the county clerk with as little delay as possible after they are taken, in order that the district attorney may have ample time to peruse and examine them before the session of the grand jury, and become acquainted with the facts before the case is under examination by the grand jury. The grand jury is generally sworn, charged and organized at the opening of the court, and enter at once upon the discharge of their duties; and where the criminal examinations and recognizances are kept back, and not returned by the committing magistrate until the first day of the court, the district attorney, owing to the pressure of business suddenly thrust upon him, has very seldom, and especially in counties where there is much criminal business to be attended to, the necessary time to read the preliminary examination with the attention it deserves. The want of time to properly examine these papers filed by the committing magistrate, often involves expense upon the county by a waste of time in examining unimportant witnesses; and often a criminal owes his escape to the want of evidence before the grand jury upon a material question, which in many cases would have been supplied by the subpoenaing of an additional witness to that fact, had the district attorney perused the examination with the necessary time and attention. One of the main objects in requiring the testimony of the witnesses for the prosecution to be filed, was that the district attorney and grand jury might be put at once in possession of the facts elicited upon the preliminary examination, and save trouble and time upon their part.

The statute further provides that if any magistrate shall refuse, or neglect to return to the proper court, the examinations or recognizance by him taken, he may be compelled, by rule of

¹ 2 R. S., 709, § 28.

court forthwith, to return the same, and, in case of disobedience of such rule, may be proceeded against by attachment, as for a contempt of court, in the manner provided in the eighth chapter of the third part of the Revised Statutes.¹

§ 26. POWER OF ASSOCIATING ANOTHER MAGISTRATE WITH THE ONE BEFORE WHOM COMPLAINT WAS MADE.

The statute declares it to be lawful for any magistrate to whom any complaint may be made, or before whom any prisoner may be brought as hereinbefore mentioned, to associate with himself any other magistrate of the same county, and the powers and duties hereinbefore mentioned, may be executed by such two magistrates so associated.²

§ 27. SPECIAL PROVISIONS IN RELATION TO THE ARREST OF FUGITIVES FROM JUSTICE WHO HAVE FLED FROM OTHER STATES AND TERRITORIES.

The officers, specified in section two of this chapter, also have power to issue process for the apprehension of a person charged in any State or territory of the United States with treason, felony or other crime, who shall flee from justice and be found within this State.³

The proceedings are in all respects similar to those hereinbefore mentioned for the arrest and commitment of persons committing offences within this State.⁴

If, from the examination had in such case, it shall satisfactorily appear that such person has committed a criminal offence and is a fugitive from justice, such magistrate, by warrant reciting the accusation, shall commit such fugitive from justice to the common jail, there to be detained for such time, to be specified in said warrant, as the said magistrate shall deem reasonable, to enable such fugitive to be arrested by virtue of the warrant of the executive of this State, issued according to the act of Congress upon the requisition of the executive authority of the State or territory in which such fugitive committed such offence, unless

¹ 2 R. S., 709, § 29.

² 2 R. S., 710, § 30.

³ Laws 1839, ch. 350, § 1; 2 R. S., 710, § 41.

⁴ Id., § 2; Id., § 42.

such person shall give bail as specified in the next section, or until he shall be discharged according to law.¹

The person thus arrested may give bail in such sum as by the magistrate shall be deemed proper, conditioned that he will appear before the said magistrate at such time as to the said magistrate shall seem reasonable, and will deliver himself up to be arrested upon the warrant of the executive of this State.²

The magistrate, before whom such person shall have been examined and committed, shall immediately cause written notice to be given to the district attorney of the county where such commitment takes place, of the name of such person and the cause of his arrest, and the said district attorney shall immediately thereafter cause notice to be given to the governor of the State or territory, or to the State's attorney, or to the presiding judge of the criminal courts of the city or county of the State or territory having jurisdiction of the offence so charged to have been committed by such person, to the end that a demand, in pursuance of the act of Congress, may be made for the arrest and surrender of such person.³

The person thus arrested, detained or bailed shall be discharged from such detention or bail unless, at or before the expiration of the time designated in the warrant of commitment, he shall be demanded or arrested by such warrant of the executive of this State.⁴

The act further makes it the duty of the magistrate, to make return to the next court of sessions of his proceedings in the premises.⁵

It thereupon becomes the duty of the Court of Sessions to inquire into the cause of the arrest and detention of such person, and if such person is in custody, or the time for his arrest, as designated in the condition of the bail bond has not elapsed, the said Court of Sessions, in its discretion, may discharge the said person from detention, or may order the said bail bond to be cancelled, or may continue his detention for a period beyond the time specified in the warrant of commitment, or may order new

¹ Laws 1839, ch. 350, § 3; 2 R. S., 710, § 43.

² Id., § 4; Id., § 44.

³ Id., § 5; Id., § 45.

⁴ Id., § 6; Id., § 46.

⁵ Id., § 7; Id., § 47.

bail to be given, conditioned for the surrender of the said person, at a time shorter or longer than the time designated in the bail bond taken by the said magistrate, and if said person is in custody, may take bail conditioned for his appearance before said court, to be surrendered at such time as to said court may seem reasonable and proper.¹

§ 28. COMPROMISING OFFENCES BEFORE INDICTMENT.

Where any person shall be bound by recognizance to appear, or shall be committed to prison on any charge for an assault and battery, or other misdemeanor, for which the injured party shall have a remedy by civil action, except such offences as are hereinafter specified, if the injured party shall appear before the magistrate who may have taken the recognizance or made the commitment, or before any judge of the County Courts, and acknowledge in writing that he has received satisfaction for such injury and damage, such magistrate or judge may, in his discretion, on payment of the costs which have accrued, by an order under his hand, discharge such recognizance, or supersede the commitment of the offender, and may in like manner discharge every recognizance which may have been taken for the appearance of any witnesses in such case.²

Every such order discharging any recognizance, shall be filed in the office of the clerk of the county, and every such order superseding the commitment of the offender, shall be delivered to the keeper of the jail where he shall be confined, who shall immediately discharge such offender on the receipt thereof.³

The above provisions do not extend to any charge for any assault and battery, or other misdemeanor, charged to have been committed : 1. By or upon any officer or minister of justice whilst in the execution of the duties of his office ; or, 2. Riotously ; or, 3. With an intent to commit a felony.

¹ Laws 1839, ch. 350, § 7 ; 2 R. S., 710, § 47.

² 2 R. S., 730, § 70.

³ Id., § 71.

SECTION III.

PROCEEDINGS SUBSEQUENT TO THE RETURN OF THE WARRANT WHERE THE OFFENCE CHARGED IS TRIABLE BEFORE A COURT OF SPECIAL SESSIONS.

Section XXIX.—GENERAL REMARKS.

- XXX.—CUSTODY OF THE PRISONER PREVIOUS TO AND DURING THE TRIAL.
- XXXI.—PROCEEDINGS UPON CHARGE AND PLEA.
- XXXII.—TRIAL WITHOUT JURY.
- XXXIII.—WHEN JURY TRIAL TO BE HAD.
- XXXIV.—SUMMONING THE JURY.
- XXXV.—IMPANNELING THE JURY.
- XXXVI.—NEW VENIRE.
- XXXVII.—OATH TO JURORS.
- XXXVIII.—OF THE WITNESSES.
- XXXIX.—PROOFS TO THE JURY, AND THEIR DELIBERATION.
- XL.—VERDICT.
- XLi.—PUNISHMENT ON CONVICTION.
- XLII.—OF THE ACQUITTAL OF THE DEFENDANT, AND CONCERNING COSTS.
- XLIII.—JUDGMENT NOW EXECUTED.
- XLIV.—PAYMENT AND ACCOUNTING FOR FINES.
- XLV.—RECORDS OF CONVICTION.
- XLVI.—WHEN FILED.
- XLVII.—CERTIFICATE—HOW FOR EVIDENCE.
- XLVIII.—SPECIAL PROVISIONS IN RELATION TO COURTS OF SPECIAL SESSIONS IN THE CITY AND COUNTY OF NEW YORK.
- XLIX.—FEES OF JUSTICES IN CRIMINAL CASES, AND OF COURTS OF SPECIAL SESSIONS.

§ 29. GENERAL REMARKS.

The organization of courts of special sessions, the officers who are to hold the same, and the several offences of which they have cognizance, will be found treated of in the preceding pages of this book.¹ In the first subdivision of this chapter, we traced the proceedings from the making of the complaint to the arrest of the offender and return of the warrant. In the second subdivision, we saw what proceedings were taken upon the return of the warrant where a court of special sessions had no authority to try the offender, and we now propose to review the proceedings upon the return of the warrant in cases where a court of special sessions has jurisdiction over the offence charged.

Many of the questions which arise upon a trial by jury in a court of special sessions, for instance the qualifications of jurors, the subject of challenges, the custody and conduct of the jury during their deliberations, are similar to those occurring upon a jury trial in the higher courts, and reference to those questions which are not found discussed in this chapter, is made to the same questions which will be found treated of in the chapter devoted

¹ Vide page 30, ante.

to the trial of indictments in courts of record.¹ Although many of the provisions of the statute give courts of special sessions exclusive jurisdiction to try certain offences, yet from the authorities already cited,² it is obvious that two courses remain to be pursued by the defendant upon his being arrested and brought before a magistrate upon a criminal accusation, which courts of special sessions are empowered to try, and these are either to give bail to the next criminal court having cognizance of the offence, in the same manner as already spoken of in cases where the defendant has been arrested upon a criminal charge, which a court of special sessions has no power to try,³ or else to proceed and be tried by such court of special sessions in the manner pointed out by the statute.

The party arrested may at once waive any examination and give such bail. He may request to be tried by such court of special sessions; and in case he do not make such request to be tried, and after having been required by the magistrate, shall omit for twenty-four hours after such requirement to give bail for his appearance at the next criminal court having jurisdiction, the magistrate is to proceed as a court of special sessions and try the accused.⁴

It is generally the practice among magistrates where a defendant does not, upon his own behalf, ask to give bail to the next criminal court having jurisdiction, for the purpose of having the charge against him presented to a grand jury, and thus have his trial in a court of record, before a common law jury, to proceed and try him before a court of special sessions, without requiring the prisoner to give bail, and waiting twenty-four hours for him to do so before proceeding to his trial as mentioned in the section of the statute above cited. This action, however, must be viewed as based upon the constitutionality of the acts of the Legislature, giving the courts of special sessions exclusive jurisdiction to try the offence charged; but the courts having decided the authority thus attempted to be conferred to be unconstitutional and void,⁵ it is presumed to be the better practice to follow the old provision of the statute and make the request for bail of the prisoner

¹ Post.

² Vide page 34, ante.

³ Vide ante.

⁴ 2 R. S. 712, § 3.

⁵ *Peo. v. Kennedy*, 2 Park., 312; *Peo. v. Tonybee*, 2 Park., 490.

before proceeding to trial. It is not necessary for any magistrate to take the examination of any person brought before him charged with an offence triable before such magistrate, where such person shall elect to be tried before him.¹

§ 30. CUSTODY OF THE PRISONER PREVIOUS TO AND DURING THE TRIAL.

During the twenty-four hours allowed to a person to give bail, as provided by the statute, and during the time which shall elapse before the convening of a court of special sessions, the person charged may be committed to jail for safe keeping, or he shall continue in the custody of the officer arresting him as the magistrate issuing the warrant of arrest shall direct, and after the court of special sessions shall have convened, the prisoner charged shall be brought before it, and shall continue in the custody of the officer having him in charge until the termination of its proceedings.²

§ 31. PROCEEDINGS UPON CHARGE AND PLEA.

The court having met, shall cause the prisoner to be brought before it, and shall, as soon as may be, proceed to his trial. The charge made against the defendant, as stated in the warrant of arrest or commitment, shall be distinctly read to such defendant, who shall be required to plead thereto. The court is to enter his plea in the minutes of its proceedings to be kept by it.³

It is not required that the plea of the defendant should be in writing, although where other pleas than that of not guilty are introduced, it is better, for the sake of certainty, that they should be in writing. For the different kinds of pleas which may be made by a person charged with the commission of a criminal offence, reference is made to the discussion of that subject in the chapter entitled "of the practice upon the trial of indictments."⁴

The same defences may be set up by plea on the part of the prisoner in courts of special sessions as in courts of record, where the same or a similar state of facts exist. Thus, on a trial

¹ 2 R. S., 709, § 27, Laws 1845, ch. 180, § 7.

² 2 R. S., 712, § 5.

³ 2 R. S., 712, §§ 6, 7.

⁴ Vide post.

for an assault and battery, before a court of special sessions, a former trial and sentence cannot be given in evidence under a plea of not guilty. Under the plea of not guilty, the defendant can only give in evidence whatever negatives the allegation in the complaint, and matters of excuse or justification, and where, after pleading not guilty, anything occurs available as a defence, the defendant can only avail himself of it by a subsequent plea.¹

§ 32. TRIAL WITHOUT JURY.

If the defendant plead not guilty, and no jury be demanded by him, the said court shall proceed to try such issue, and to determine the same according to the evidence which may be produced against and in behalf of such defendant.²

§ 33. WHEN JURY TRIAL TO BE HAD.

After the joining of such issue, and before the court shall proceed to an investigation upon the merits of the cause by the hearing of any testimony, the defendant may demand of such court that he be tried by a jury; upon such demand the court shall issue a venire, directed to any constable of the county or marshal of the city where the offence is to be tried, commanding him to summon twelve good and lawful men, qualified to serve as jurors and not exempt from service by law, and who shall be in no wise of kin either to the complainant or the defendant, to be and appear before such court, at a time not more than three days from the date of the venire, and at a place to be named therein, to make a jury for the trial of such offence.³

The several questions in relation to the qualification of jurors, the grounds of exemption from jury service, and of challenges to jurors, together with the method and manner of exercising the right of such challenge, are the same in these courts as in courts of record; except that in courts of special sessions the defendant's right of peremptory challenge extends to only two of the persons drawn as jurors. They will be found discussed in full in the subsequent chapter, concerning the trial of indictments in courts of record.⁴ To render a conviction before a court of

¹ *Peo. v. Benjamin*, 2 Park., 201.

² 2 R. S., 712, § 8.

³ 2 R. S., 712, § 9.

⁴ *Vide post*.

special sessions valid, it is not necessary that the court should inform the prisoner of his right to be tried by a jury or that he should expressly waive such right.¹ The defendant's right to a jury trial in a court of special sessions may be waived, by agreement, at any time before judgment and he be tried by the magistrate.²

§ 34. SUMMONING THE JURY.

The officer to whom such venire shall be delivered shall execute the same fairly and impartially, and shall not summon any person whom he shall suspect to be biased or prejudiced for or against the defendant. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire, and return with it to the court.³

§ 35. IMPANNELING THE JURY.

The names of the persons so returned, shall be respectively written on several and distinct pieces of paper, as nearly of one size as may be, and the officer by whom the venire was served, in the presence of the court, shall roll up or fold such pieces of paper as nearly as may be, in the same manner, and put them together in a box or other convenient thing. The court shall then draw out six of such papers, one after another, and if any of the persons whose names shall be so drawn shall not appear, or appearing shall be challenged and set aside, then such further number shall be drawn as will be sufficient to make up the number of six after all legal causes of challenge shall have been allowed. If a sufficient number of competent jurors shall not be drawn, the court may supply the deficiency by directing the constable to summon any of the bystanders or others, who may be competent, and against whom no cause of challenge shall appear, to act as jurors in the cause.⁴

The Special Sessions has no authority to try a person by a jury of less than six, though he and the prosecutor consent thereto, and the proceedings upon such trial are void ; consent cannot create a tribunal.⁵

¹ *Peo. v. Goodwin*, 5 Wend., 253.

² *Germond v. Peo.*, 1 Hill., 343.

³ 2 R. S., 713, § 10.

⁴ 2 R. S., 713, §§ 11, 12, 13.

⁵ *Germond v. Peo.* 1 Hill, 343. See 18 N. Y. R., 128.

§ 36. NEW VENIRE.

If the officer to whom the venire shall have been delivered, shall not return the same as thereby required, the court shall issue a new venire, upon which the same proceeding shall be had as above provided, in respect to the first venire.¹

A Court of Special Sessions has the power, and it is their duty, to issue a second venire for the jury to try the defendant, if the first jury are discharged because they cannot agree upon a verdict.²

§ 37. OATH TO JURORS.

To each juror the court shall administer the following oath or affirmation: "You do swear in the presence of Almighty God (*or*, "you do solemnly affirm," as the case may be), that you will well and truly try this traverse between the People of the State of New York and ———, the defendant, and a true verdict give according to the evidence, unless discharged by the court."³

§ 38. OF THE WITNESSES.

The magistrate having authority to examine into the nature and circumstances of a criminal charge against an offender, has also power, as incident to his authority, to bring before him all persons who appear, from the oath of the complainant or from the magistrate's own knowledge, to be material witnesses for the prosecution.⁴ And upon the reasonable request of the defendant, he has a similar power to bring before him any witness who may be able to give material evidence in his behalf.⁵

The attendance of the witnesses is to be compelled in the same manner as in other cases by subpoena and attachment. All subpoenas issued should be indorsed by the magistrate, showing whether the same were issued for the people or the prisoner.⁶

Any justice of the peace or alderman is authorized by statute to issue subpoenas to compel the attendance of witnesses before a court of special sessions, and upon the trial before such court

¹ 2 R. S., 713, § 14.

² *Vanderwerker v. Peo.*, 5 Wend., 530.

³ 2 R. S., 713, § 15.

⁴ 1 Ohit. Cr. L., 76.

⁵ *Id.*; 3 Inst., 79; 4 Bla. Com., 359.

⁶ 2 R. S., 710, § 40.

the person composing the same may administer the oath required by law to such witnesses.¹

In case any person summoned to appear before any court of special sessions as a juror or witness shall fail to appear, he shall be liable to the like penalties, and may be proceeded against in like manner as provided by law in respect to jurors and witnesses in justices' courts. No fees shall be allowed to or taken by any juror or witness for any services, under the provisions of the statute mentioned in this chapter.²

The provisions of the statute in relation to compelling the attendance of witnesses in justices' courts, above referred to, are as follows: "Whenever it shall appear to the satisfaction of the justice, by proof made before him, that any person duly subpoenaed to appear before him in any cause, shall have refused or neglected, without just cause, to attend as a witness in conformity to such subpoena, and the party in whose behalf such witness shall have been subpoenaed shall make oath that the testimony of such witness is material, the justice shall have power to issue an attachment to compel the attendance of such witness."³

The proof above mentioned may be made by the affidavit of the party in the suit applying for such attachment, or by other competent testimony to the satisfaction of the justice before whom such suit is pending.⁴ The affidavit need not be an oath in writing, according to the strict and technical sense of that word. The application for the attachment and the oath in support of it may be oral.⁵

The attachment is to be executed in the same manner as a warrant.⁶ Every person, duly subpoenaed as a witness, who shall not appear or appearing shall refuse to testify, shall forfeit for the use of the poor of the town, for every such non-appearance or refusal (unless some reasonable cause or excuse shall be shown on his oath or the oath of some other person), such fine, not less than sixty-two cents nor more than ten dollars, as the justice, before whom prosecution therefor shall be had, shall think reason-

¹ 2 R. S., 716, § 64.

² 2 R. S., 717, §§ 65, 66.

³ 2 R. S., 241, § 73.

⁴ Id.; Laws, 1834, ch. 235.

⁵ *Baker v. Williams*, 12 Barb., 527.

⁶ 2 R. S., 241, § 74.

able to impose; such fine may be imposed if the witness be present and have an opportunity of being heard against the imposition thereof.

The justice, imposing any fine, shall make up and enter in his docket a minute of the conviction and of the cause thereof, and the same shall be deemed a judgment in all respects at the suit of the overseers of the poor of the town. The justice is authorized, upon the imposition of such fine and in default of payment thereof, to issue an execution against the goods and chattels of the delinquent to any constable of the county, and for want thereof to convey him to the jail of the county, there to remain until he shall pay such fine and costs; but such imprisonment is not to exceed thirty days.¹

§ 39. PROOFS TO THE JURY AND THEIR DELIBERATION.

After the jury shall have been sworn, they shall sit together and hear the proofs and allegations in the case, which shall be delivered in public, and in the presence of the defendant. After hearing such proofs and allegations, the jury shall be kept together in some convenient place until they agree on a verdict or are discharged by the court, and a constable or marshal shall be sworn in like manner, as upon trials in justices' courts.²

The following is the form of the oath to the officer: "You swear in the presence of Almighty God that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on."³ •

The jury should always be put in charge of a constable, sworn to attend them, unless they find a verdict on the spot, without

¹ 2 R. S., 241, §§ 75, 76, 77, 78.

² 2 R. S., 713, §§ 16, 17.

³ 2 R. S., 244, § 100.

leaving their seats; and this, whether the jury retire from the court, or the court leaves them alone in the court-room.¹

Where, after a trial had commenced before a court of special sessions, a postponement took place at the instance of the prisoner for several days, and the jury were allowed to separate in the meantime, having been previously admonished by the court, however, not to converse with any one in relation to the case, it was held not a sufficient ground for reversing the conviction, especially as no misbehavior on the part of the jurors was alleged.²

The fact that on a trial in a justice's court, the jury, during their deliberations, had in their possession the minutes of the testimony taken by the counsel for the successful party, is sufficient cause for reversing the judgment.³

But where the justice, while the jury are deliberating upon their verdict, enters the jury room at their request, and with the knowledge and consent of the defendant, a consent that he may read to the jury the testimony of a witness will be implied.⁴

§ 40. VERDICT.

When the jurors have agreed on their verdict, they shall deliver the same to the court publicly, who shall enter it in the minutes of its proceedings to be kept by the court.⁵

The verdict of the jury cannot be reviewed upon the ground that it was against evidence, and the appellate court cannot pass upon the question whether the finding by the jury, before a court of special sessions, was against or without evidence.⁶

§ 41. PUNISHMENT ON CONVICTION.

Whenever a defendant, tried under the above-mentioned provisions of the statute, either by the court or by a jury, shall be convicted, the court shall render judgment thereupon, and inflict such punishment by fine or imprisonment, or both, as the

¹ *Douglass v. Blackman*, 14 Barb., 381.

² *Beebe v. Peo.*, 5 Hill, 32.

³ *Durfee v. Eveland*, 8 Barb., 46.

⁴ *Hancock v. Salmon*, 8 Barb., 564.

⁵ 2 R. S., 713, § 18.

⁶ *Vanderwerker v. Peo.*, 5 Wend., 530; 12 Wend., 344.

nature of the case may require, but such fine shall in no case exceed fifty dollars, nor such imprisonment six months.¹

§ 42. OF THE ACQUITTAL OF THE DEFENDANT AND CONCERNING COSTS.

Whenever a defendant, tried under the provisions of the statute above referred to, either by the court or by a jury, shall be acquitted, he shall be immediately discharged. And if the court before whom the trial is had shall certify in its minutes that the complaint was willful and malicious, and without probable cause, it shall be the duty of the complainant to pay all the costs that shall have accrued to the court and constable in the proceedings had upon such complaint, or to give a satisfactory bond to the people of this State, with one or more sureties, to pay the same in thirty days after the said trial. If the complainant shall refuse or neglect to pay such costs, or to give such security, the court may forthwith enter judgment against him for the amount of such costs, and commit him to the common jail of the county in which the trial was had, there to remain, in like manner and for the same time as if committed on a justice's execution in a civil cause, until he shall satisfy such judgment, with the costs of the commitment, or until he shall be discharged by due course of law.²

The last mentioned provisions of the Revised Statute were amended by the Legislature of 1845, by the following enactment: Whenever a magistrate or a jury, before whom a criminal cause shall be tried under the act reorganizing courts of sessions, shall be satisfied from the evidence and proceedings had before them, that the person or persons charged and tried were complained of and proceeded against without probable cause, and with malicious intent to injure or harass, they may render a verdict for costs against the complainant; whereupon the magistrate shall enter judgment for the amount of such costs upon which an execution may issue against the property or person of such complainant, in the same manner as upon a judgment rendered for a tort by a justice of the peace.³

¹ 2 R. S., 714, § 19.

² 2 R. S., 714, §§ 20, 21.

³ Laws 1845, ch. 180, § 16, p. 186; 2 R. S., 714, § 22.

§ 43. JUDGEMENTS, HOW EXECUTED.

The judgment of every court of special sessions shall be executed by the sheriff, constables and marshals of the county, or city and county in which the conviction shall be had, by virtue of a warrant under the hands of the magistrate who held the court, to be directed to such officers or to such of them as may be necessary, and specifying the particulars of such judgment.¹

A court of special sessions, before whom a conviction is had, may proceed and cause their judgment to be executed, notwithstanding notice of an intention to remove the conviction and the entrance into recognizance by the defendant, if a certiorari is not sued out.²

A warrant of commitment issued, by a justice of the peace upon a conviction for petit larceny, is void unless it be directed to the officer or class of officers by whom it is to be executed, and will afford no protection to a constable who executes it. The Legislature, by the section of the statute relative to warrants of commitment issued by courts of special sessions, did not intend to prescribe a form for such warrants, or to vary the common law rule respecting them; hence a warrant which would be good at common law will be valid under the statute.³ The commitment need not state facts, which the statute does not require that the record of conviction should state. Thus, under the provisions of the statute,⁴ prescribing that, in any other county than New York, the record "shall briefly state the offence charged, and the conviction and judgment thereon, and if any fine has been collected the amount thereof, and to whom paid," the necessity of averring the jurisdictional facts in the writ is dispensed with, by the provision that the record need not set forth those facts. Hence a commitment, issued upon a conviction before a court of special sessions, need not contain a statement that the defendant, when brought before a magistrate, requested to be tried before a court of special sessions; nor that, having been required by the magistrate to give bail, the defendant omitted for twenty-four hours to do so; nor whether the defendant demanded a jury.⁵

¹ 2 R. S., 716, § 60.

² *Peo. v. Gates*, 5 Wend., 111.

³ *Russell v. Hubbard*, 6 Barb., 654. Vide ante.

⁴ 2 R. S., 711, § 38.

⁵ *Peo. v. Moore*, 3 Park., 465.

hear and determine the accusation. Before the act of 1855 it is presumed it was the practice, in every case where the accused was admitted to bail and wished to be tried at the special sessions, to take a recognizance for his appearance at the general sessions, and if he failed to appear at the special sessions to have him indicted, and if he neglected to appear at the general sessions to answer the indictment to forfeit his recognizance. The special sessions obtained jurisdiction if the accused did not require to be tried at the general sessions; or did not, within twenty-four hours after being committed on the charge, enter into a recognizance for his appearance at the next court of general sessions; or if, having entered into such recognizance, he saw fit thereafter to demand to be tried by the special sessions. The object of these provisions was to enable the party, accused of these petty offences, to have a more speedy trial if he desired it. But the act of 1855¹ made a very material change; it greatly enlarged the powers of courts of special sessions, by declaring that it should have exclusive jurisdiction of all misdemeanors; unless it should order the complaint to be heard at the general sessions, or unless the accused, when arrested and brought before the committing magistrates, should elect to have his case heard and determined by the general sessions, and it was made the duty of the magistrate to inform him of this provision; and where a party is brought before the special sessions of the city of New York, and enters into a recognizance for his appearance at the general sessions, it must be regarded as an election by him and as a recognition by the magistrate of his election to be tried by the general sessions, and the special sessions thereafter has no jurisdiction of the case, and this is so whether the accused was informed or not by the magistrate or the clerk of special sessions that it was his privilege to elect to be tried at the general sessions, as required by the statute.²

In all cases of misdemeanors in the city and county of New York, where the accused, upon being arrested and brought before the committing magistrate, shall elect to have his case heard and determined by the court of special sessions, agreeably to the provisions of the statute above referred to, the affidavit of complaint shall be forthwith filed with the clerk of said court to the end,

¹ Laws 1855, p. 613, ch. 337.

² *Pao. v. Doyle*, 19 How., 11.

that the said court may proceed to hear and determine the same according to law. If the accused be admitted to bail after electing to be tried by the court of special sessions, a recognizance shall be taken for the appearance of the accused at the said court of special sessions, which shall also be filed with the clerk of said court; and if the accused shall fail to appear, pursuant to the condition of said recognizance, the said court shall, by an order entered in their minutes, direct the same to be forfeited, and the clerk thereof, shall return said recognizance, with a certified copy of the minutes forfeiting the same, to the district attorney of the city and county of New York, to the end that the accused and sureties may be prosecuted thereon according to law.¹

The statute provides that in hearing and determining any accusation, according to the above mentioned provisions of the statute, the special sessions shall proceed in the same manner as hereinbefore mentioned for trials in courts of special sessions in other parts of the State, except as to the summoning of a jury, and upon the conviction of the offender, shall sentence him to the punishment prescribed by law.² The statute further provides for the powers of this court, by issuing warrants to enforce its judgments and orders, and to bring accused persons before it for trial or judgment, and issuing subpoenas for witnesses, attachments for contempt, and other process necessary for the proper conduct of the court; the process to be tested in the name of any justice of the court and signed by the clerk, and the subpoenas to be served by some proper person under the direction of the clerk.³

When poor witnesses for the people have been committed, the court may order the payment to them of such sum as may seem reasonable, not exceeding ten dollars.⁴

In cases of arrest for intoxication or disorderly conduct in the city of New York, the police justices, in addition to holding the party to bail for good behavior, have power to impose a fine not exceeding ten dollars, or to commit to the city prison not exceeding ten days, each day of imprisonment to be taken as a liquidation of one dollar of the fine. The fines collected by wardens

¹ Laws 1859, ch. 491, § 1, p. 1129.

² 2 R. S., 715, § 51; *Peo. v. Riley*, 5 Park., 409; *Murphy v. Peo.*, 2 Cow., 815.

³ *Id.*, § 2.

⁴ *Id.*, § 3.

of the prisons are to be paid to the clerk of the court, and the clerks are to return the same monthly to the county treasurer, with the names of the persons paying the same and the amounts.¹

Under the former provisions of the Revised Statutes,² persons who were tried and sentenced by a court of special sessions in the city and county of New York, without having demanded a trial, might appeal from such sentence to the court of general sessions of the city and county of New York. Such appeal was to be made at the time sentence was pronounced, and thereupon the conviction was to be void. The said court was thereupon required to enter such appeal in its minutes, and was to proceed in the same manner as if no such trial had been had, to take a recognizance from the accused, with sufficient surety, to appear at the general sessions of said city and county, or in default of giving such recognizance, was to commit him to prison, and to take the same measures to insure the attendance of the witnesses in behalf of the prosecution at the said court of general sessions as in other cases.³ The court of general sessions thereupon proceeded in every such case by indictment and other proceedings, in the same manner as if no such trial or conviction had been had.⁴

There does not seem to be any repeal of the above provisions in regard to the right to appeal and proceedings had thereon,⁵ and it has been held that the provisions of the act of 1859, which gives certiorari to remove into the court of sessions any conviction had before any court of special sessions or police court, does not apply to the court of general sessions of the peace in the city and county of New York,⁶ although the Court of Appeals have since held that that court is but a court of sessions for the county of New York, and that a court of general sessions of the peace, and a court of sessions of any county, are one and the same tribunal.⁷

Where a person arrested and brought before a magistrate in the city of New York under a charge of petit larceny, presented

¹ 2 R. S., 715, § 5.

² 2 R. S., 715, § 52.

³ Id., §§ 53, 54.

⁴ Id., § 55.

⁵ *Peo. v. Riley*, 5 Park., 401.

⁶ *People v. Sessions*, 15 Abb., 59.

⁷ *Lowenbery v. Peo.*, 27 N. Y., 336.

to a magistrate a writing signed by him, in which he waived a jury, and demanded to be tried before a court of special sessions, it was held that he waived thereby his right, when subsequently brought before the court of special sessions, to demand a jury and to have his case removed to the general sessions, and also his right of appeal to the general sessions, under 2 Revised Statutes, 715, section 52.¹

Whenever sentence shall be pronounced upon any person convicted of any offence in the said court of special sessions, the clerk thereof shall, as soon as may be, make out and deliver to the sheriff of the said city and county, or his deputy, a transcript of the entry of such conviction, in the minutes of the said court, and of the sentence thereupon, duly certified by the said court, which shall be sufficient authority to such sheriff or deputy to execute such sentence, and he shall execute the same accordingly.²

Transcripts of conviction had in the said court shall not be required to be certified by the magistrate holding the said court, but a duly certified copy of any such conviction, made by the clerk of said court, shall be evidence in all courts and places of the facts contained therein.³

All fines imposed by the said court shall be received by the clerk thereof, who shall return the same monthly under oath to the chamberlain of the city.⁴

§ 49. FEES OF JUSTICES IN CRIMINAL CASES AND OF COURTS OF SPECIAL SESSIONS.

The several justices of the peace in the State are to be allowed and receive the following fees, for the services hereinafter mentioned in criminal cases: For administering an oath, ten cents; a warrant (but no justice of the peace shall be obliged to issue a warrant on any complaint for assault and battery, unless the person making such complaint and requiring such warrant, shall pay the fee therefor) twenty-five cents; a bond or recognizance, twenty-five cents; a subpoena, including all the names inserted therein, twenty-five cents; a commitment for want of bail, twenty-five cents; for an examination of the accused, where such examination

¹ *Peo. v. Riley*. 5 Park., 401.

² *Laws* 1830, ch. 42, § 5; 2 R. S., 715, § 57; *Laws* 1858, ch. 282, § 3.

³ *Laws* 1858, ch. 282, § 5; 2 R. S., 224, §§ 7, 8; 2 R. S., 715, § 59.

⁴ *Laws* 1858, ch. 282, § 4.

is required by law, for each day necessarily spent, one dollar; for every necessary adjournment of the hearing or examination, twenty-five cents.¹

The fees of courts of special sessions are as follows: For a venire, twenty-five cents; for swearing a jury, twenty-five cents; for swearing each witness on the trial, ten cents; for a subpoena, including all names inserted therein, twenty-five cents; for a trial fee, one dollar per day during the necessary and actual continuance of the trial; for swearing constable to attend a jury ten cents; for receiving and entering the verdict of the jury, twenty-five cents; for entering the sentence of the court, twenty-five cents; for warrant of commitment on sentence, twenty-five cents; for record of conviction and filing the same, seventy-five cents; but all such charges, in any one case, shall not exceed five dollars, unless such court continue more than one day; in such case, the costs of such additional day may be added thereto; for a return to any writ of certiorari, to be paid by the county, two dollars; for services, when associated with another justice of the peace in cases of bastardy, for each day actually and necessarily spent, two dollars.²

¹ Laws 1866, ch. 692, p. 290, § 3.

² Id., § 4.

CHAPTER XI.

OF THE REMOVAL BY CERTIORARI OF THE PROCEEDINGS AND JUDGMENT UPON CONVICTIONS IN THE COURTS OF SPECIAL SESSIONS AND POLICE COURTS INTO THE COURT OF SESSIONS.

- Section I.—GENERAL REMARKS.
 II.—WHO TO ALLOW CERTIORARI.
 III.—WHEN TO BE APPLIED FOR, AND AFFIDAVIT.
 IV.—WHEN TO BE GRANTED.
 V.—SERVICE OF THE WRIT AND AFFIDAVIT ON THE MAGISTRATE.
 VI.—RETURN TO THE WRIT AND FILING OF PAPERS.
 VII.—RETURN NOW COMPELLED.
 VIII.—SERVICE OF PAPERS AND NOTICE OF ARGUMENT.
 IX.—DUTY OF THE DISTRICT ATTORNEY.
 X.—HEARING ON THE RETURN BY COURT OF SESSIONS.
 XI.—STAYING EXECUTION ON CONVICTION.
 XII.—DISCHARGING PRISONER.
 XIII.—FILING THE RECOGNIZANCE.
 XIV.—PROCEEDINGS ON THE RECOGNIZANCE.
 XV.—JUDGMENT.
 XVI.—PROCEEDINGS ON THE JUDGMENT.
 XVII.—QUASHING THE CERTIORARI.

SECTION I.

GENERAL REMARKS.

The Legislature of 1857 passed an act entitled "An act defining the powers and duties of courts of special sessions, except in the city and county of New York and the city of Albany, and court of sessions, and regulating appeals in criminal cases."¹ The first two sections of the act defined the general powers and duties of the courts of special sessions, and of their jurisdiction to hear charges for certain crimes, and the remaining twenty-three sections, were devoted to the regulation of appeals from convictions or sentences of courts of special sessions or police courts. The act above mentioned, by the terms thereof, repealed the former provisions of the Revised Statutes in relation to writs of certiorari to courts of special sessions, and substituted the method of appeal in said act prescribed, in the place thereof.

The Legislature of 1859, (chap. 339,) passed an act repealing all of the act of 1857, with the exception of the first two sections

¹ Session Laws 1857, ch. 769.

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thereof above mentioned, and restoring, with some few modifications, the practice as it existed under the Revised Statutes prior to the passage of the act of 1857.

The act of 1859 provides that the courts of sessions of the several counties are vested with the same power, within their respective counties, in relation to certiorari to courts of special sessions and police courts, and the proceedings thereon, and all matters growing out thereof, or subsequent thereto, or connected therewith, as are possessed by the Supreme Court, under article four of title three of chapter two of the fourth part of the Revised Statutes. All the provisions of said article fourth, except as herein otherwise provided, are made applicable to such certiorari hereby authorized, and to the allowance thereof, and to the proceedings thereon, and to all matters growing out thereof, or subsequent thereto, or connected therewith, including recognizances, judgment and sentence; but the writ, affidavit and return, in cases under this act, shall be filed in the office of the county clerk, and the notice required by said article fourth to be served on the Attorney General shall in such cases be served on the district attorney of the county.

The principal distinction is the substitution of the courts of sessions of the several counties in the place of the Supreme Court, in the proceedings under the writ.

The provisions of the Revised Statutes, above referred to, are not contained in the Revisers' 5th edition. They were omitted because repealed by the act of 1857. They will be found in the second volume of the fourth edition, at page 902.¹

It has been held that the act of 1859 does not apply to the courts of general sessions of the peace in the city and county of New York;² but it was subsequently held that the court of general sessions of the peace, and a court of sessions in any county, are one and the same tribunal.³

A method is prescribed by the statute for a review by appeal to the court of general sessions of a conviction had in a court of special sessions in the city of New York.⁴

¹ 2 R. S., 718, 719.

² *Peo. v. Gen. Sessions*, 15 Abb., 59.

³ *Lowenbury v. Peo.*, 27 N. Y., 336; 26 How., 202.

⁴ *Vide ante.*

SECTION II.

WHO TO ALLOW CERTIORARI.

A writ of certiorari to remove into the court of sessions of the county, a conviction had before any court of special sessions or police court, may be allowed on the application of the party convicted, by any justice of the Supreme Court, or by any officer authorized to perform the duties of such justice in vacation.¹

Whether a certiorari to remove a conviction by the special sessions into the Supreme Court, for review under 2 Revised Statutes 717, is to be allowed or not, is in the discretion of the judge to whom the application is made, and his determination is not reviewable by certiorari.²

SECTION III.

WHEN TO BE APPLIED FOR, AND AFFIDAVIT.

The party desiring such certiorari, or some one in his behalf, shall apply for the same within ten days after such conviction shall have been had, and shall make an affidavit specifying the supposed errors in the proceedings or judgment complained of.³

The affidavit here mentioned is the initiatory step in the proceedings, and should be made within the ten days limited by the statute. It should state the proceedings had and taken prior to the conviction, and show the supposed errors complained of.

SECTION IV.

WHEN TO BE GRANTED.

If the officer to whom application for such certiorari shall be made, shall be satisfied that any error shall have been committed in the proceedings or the judgment, he shall indorse upon the writ his allowance thereof, and shall certify the affidavit upon which the certiorari was allowed. But where the defendant shall

¹ Laws 1859, ch. 339, § 2.

² *Peo. v. Moyer*, 16 Barb., 362.

³ 2 R. S., 4th ed., p. 902, § 48; 1 R. S., 717, § 48.

have been tried by a jury, no certiorari shall be allowed, upon the ground that the verdict of such jury was against evidence.¹

The appellate court cannot pass upon the question whether the finding by the jury, before a court of special sessions, was against or without evidence; and therefore, though the facts of the case be returned, they will not look into them to see whether or not the jury erred.²

SECTION V.

SERVICE OF THE WRIT AND AFFIDAVIT ON MAGISTRATE.

The said writ and original affidavit shall be delivered to the magistrate, before whom the conviction was had, within ten days after such allowance.³

SECTION VI.

RETURN TO THE WRIT AND FILING OF PAPERS.

The magistrate to whom the certiorari shall be directed, shall make a special return to all the matters specified in the affidavit accompanying the writ, and shall cause such writ, affidavit and return to be filed in the office of the county clerk within twenty days after the service of the said writ.⁴

SECTION VII.

RETURN, HOW COMPELLED.

The court of sessions have the like power to compel the making of such return, and to require the same to be amended and perfected, as the Supreme Court has in cases of mandamus.⁵

¹ 2 R. S., 4th ed., p. 902; 1 R. S., 718, § 49.

² *Vanderwerker v. the People*, 5 Wend., 530; *Son v. the People*, 12 Wend., 344.

³ 2 R. S., 4th ed., p. 903, § 50.

⁴ 2 R. S., 4th ed., p. 903, § 51, as amended by the act of 1859.

⁵ *Idem*, § 52, as amended by act of 1859.

SECTION VIII.

SERVICE OF PAPERS AND NOTICE OF ARGUMENT.

A certified copy of every certiorari to remove into the Supreme Court a conviction had before a court of special sessions, together with a certified copy of the affidavit upon which the writ is allowed, and of the return thereto, shall be served by the party prosecuting the writ, upon the district attorney of the county in which the conviction to be reviewed was had, with at least four days' notice of the argument thereof.¹

SECTION IX.

DUTY OF THE DISTRICT ATTORNEY.

It shall be the duty of the district attorney to attend to the argument of the same, and perform such duties in relation thereto as have heretofore been performed by the Attorney General.²

On certiorari to the special sessions, the return of the justice brings in review their proceedings as a court, and not the previous proceedings of the justice who issued the warrant, and a conviction cannot be reversed for his error in not examining the plaintiff and defendant.³

SECTION X.

HEARING ON THE RETURN BY COURT OF SESSIONS.

It shall not be necessary for the party convicted to appear in the court of sessions upon the prosecution of such certiorari, nor shall any assignment of errors or joinder in error be necessary; but the court of sessions shall proceed to hear the parties and give judgment on the return to such writ.⁴

¹ 2 R. S., 4th ed., p. 903, § 53.

² Id., § 53.

³ *Vandewerker v. Peo.*, 5 Wend., 530; *Son v. Peo.*, 12 Wend., 344.

⁴ 2 R. S., 4th ed., p. 903, § 54, as amended.

SECTION XI.

STATING EXECUTION ON CONVICTION.

If, at the time of his conviction, any defendant shall notify the magistrate before whom the same shall have been had, that he intends to remove such conviction by writ of certiorari, and shall offer to become bound in a recognizance, with satisfactory sureties, to appear at the next court of sessions to be held in the same county, and to abide the judgment or order of that court in the premises; it shall be the duty of such magistrate to take such recognizance, and thereupon to suspend the execution of any sentence upon such conviction. But such sentence shall be pronounced and entered in the minutes of the proceedings.¹

A court of special sessions, before whom a conviction is had, may proceed and cause their judgment to be executed notwithstanding notice of an intention to remove the conviction and the entering into a recognizance by the defendant if a certiorari is not sued out.²

SECTION XII.

DISCHARGING PRISONER.

If the party convicted shall have been committed to prison in pursuance of his sentence, upon becoming bound with a condition, as provided in the last section, with such sureties as shall be approved by the officer allowing the writ of certiorari, he shall be entitled to be discharged from such imprisonment, and the certificate of such officer, stating the facts and ordering the jailor to discharge such prisoner, shall be a sufficient warrant for his discharge.³

SECTION XIII.

FILING THE RECOGNIZANCE.

The magistrate or officer by whom any recognizance, under either of the two last sections shall be taken, shall immediately cause the same to be filed with the clerk of the county.⁴

¹ 2 R. S., 4th ed., p. 903, § 55.

² People v. Yates General Sessions, 5 Wendell, 110.

³ 2 R. S., 4th ed., p. 903, § 56.

⁴ Idem, § 57.

SECTION XIV.

PROCEEDINGS ON THE RECOGNIZANCE.

The court of sessions, in which the party so convicted and recognized shall be bound to appear, shall have the power to continue such recognizance, or to require a new recognizance with further or other surties, until the decision of the court of sessions shall be had in the premises, and in default of complying with any such requisition, the said court of sessions may commit the party so committed to close custody.¹

SECTION XV.

JUDGMENT.

If the conviction be reversed, and the defendant be in prison by virtue thereof, the court of sessions shall issue a writ of superseedeas for his discharge. Under the Revised Statutes, prior to the amendment thereof by the act of 1859, where the defendant was let to bail as above provided, the judgment of the supreme court, whether the conviction was reversed or affirmed, was remitted to the court of sessions of the proper county, to be by that court carried into effect; but, as the court of sessions by the act of 1859 was substituted for the supreme court in these proceedings, the practice of a remittitur is abrogated.² In *Pulling v. The People*, 8 Barb., 389, the court said: "Upon a proceeding of this nature, any error in the proceedings or judgment, whether in the record, or in receiving or rejecting evidence or the like, may doubtless be examined by this (supreme) court. They are probably restricted from reversing the conviction, on the ground that the verdict is against the weight of evidence. But any other errors in the proceedings and judgment, which appear on the face of the return, can surely be examined by this (supreme) court. It would be an idle ceremony to require a return of all the proceedings before the justice, if this court must shut its eyes to everything but the technical record."

¹ 2 R. S., 4th ed., p. 903, § 58, as amended by act of 1859.

² Id., § 59.

After a trial by jury the court cannot on certiorari reverse it, as against the weight of evidence,¹ and it cannot be reversed on the merits on certiorari.²

SECTION XVI.

PROCEEDINGS UPON THE JUDGMENT.

If the conviction be reversed the court of sessions shall discharge the defendant; if the conviction be affirmed, and the defendant shall have been sentenced by the court of special sessions, such court of sessions shall order that such sentence be executed; and if the defendant shall have been let out of prison, as above provided, he shall be remanded to such prison for the remainder of the term for which he was sentenced.

If the conviction be affirmed, and the defendant shall not have been sentenced, the court of sessions shall proceed to sentence the defendant upon such conviction, in the same manner and with the like effect as if such conviction had been had in the court of sessions.³

SECTION XVII.

QUASHING THE CERTIORARI.

If it shall appear to the court of sessions that the person, prosecuting such certiorari, has unreasonably delayed to notice or bring on for argument the return to such writ, such court may enter a rule to quash such certiorari, and such court shall proceed thereon in the same manner as if the judgment of the court of special sessions had been affirmed in the court of sessions.⁴

¹ 2 R. S., 4th ed., p. 903, § 59.

² *Thomas v. Peo.*, 9 Wend., 480.

³ 2 R. S., p. 903, §§ 60, 61.

⁴ 2 R. S., 4th ed., p. 904, § 62, as amended by the act of 1859.

CHAPTER XII.

OF THE PRACTICE AND PROCEEDINGS IN COURTS OF OYER AND TERMINER AND COURTS OF SESSIONS UPON THE FINDING, PRESENTMENT AND TRIAL OF INDICTMENTS.

In treating of the proceedings taken for the arrest and punishment of offenders against the criminal law in the foregoing pages, we have seen that in certain cases the accused passed from the jurisdiction of the magistrate who issued the warrant upon which the defendant was arrested. This loss of jurisdiction by the magistrate was caused either by the commitment of the accused person to the common jail of the county, or else he was let to bail, to appear at the next court having cognizance of the offence; and in either of these cases, as well as in cases where no previous action has been taken against the accused person, if it be deemed desirable to proceed further with the prosecution, the course to be pursued is, by indicting the accused. An indictment is a written accusation of one or more persons of a felony or misdemeanor, preferred to and presented upon oath of a grand jury.¹ It is not our purpose at present to treat of the form and requirement of the indictment; that subject will be found discussed in another place; but it is our design in this chapter to take into consideration the practice and various proceedings had in the courts of oyer and terminer and of sessions upon the preferring, presentment and trial of an indictment; and the rules here laid down will, in the main, be found applicable to the other courts in the State in which indictments may be found and tried. The principal difference being special enactments of the Legislature, which are made applicable in some instances to courts of a local jurisdiction. These distinctions will be found mentioned in the chapter entitled, "Of the several criminal courts of the State, and their jurisdiction."²

In examining the subjects spoken of in this chapter, they will be found arranged in the following order:

Section one. Of the proceedings from the organization of the court down to the finding and presentment of the indictment.

¹ 4 Blac. Com., 302.

² Ante, page 29.

Section two. Of the proceedings from the presentment of the indictment down to the trial.

Section three. Of the proceedings from and including the trial down to and including the verdict.

Section four. Of the sentence and punishment.

Section five. Of subsequent miscellaneous proceedings.

SECTION I.

OF THE PROCEEDINGS FROM THE ORGANIZATION OF THE COURT DOWN TO THE FINDING AND PRESENTMENT OF THE INDICTMENT.

- Section I.—THE DISTRICT ATTORNEY'S PRECEPT FOR COURTS OF OYER AND TERMINER.
 II.—PROCLAMATION BY CRIER OF THE COURT.
 III.—CALENDAR OF PERSONS CONFINED IN JAIL TO BE FURNISHED COURTS OF OYER AND TERMINER AND SESSIONS.
 IV.—OF EMPANELLING THE GRAND JURY.
 V.—OF THE GRAND JURY.
 VI.—OF THE RETURN AND SUMMONING OF THE GRAND JURORS.
 VII.—OF HEARING EXCUSES BY THE GRAND JURORS.
 VIII.—OF CHALLENGES TO THE GRAND JURORS.
 IX.—OF TALESMEN FOR THE GRAND JURY.
 X.—APPOINTMENT OF A FOREMAN TO THE GRAND JURY.
 XI.—OF THE OATH TO THE GRAND JURY.
 XII.—THE JUDGE'S CHARGE.
 XIII.—OF THE SELECTION OF A CLERK TO THE GRAND JURY.
 XIV.—OF THE PROCEEDINGS HAD BEFORE THE GRAND JURY.
 XV.—OF THE TIME WITHIN WHICH THE INDICTMENT MAY BE FOUND.
 XVI.—OF THE COUNTY IN WHICH THE INDICTMENT IS TO BE FOUND.
 XVII.—PRESENTMENT OF THE INDICTMENT.

§ 1. THE DISTRICT ATTORNEY'S PRECEPT FOR COURTS OF OYER AND TERMINER.

It is the duty of the district attorney of every county, at least twenty days before the time appointed for the holding of any court of oyer and terminer and jail delivery in his county, to issue a precept, to be tested and sealed in the same manner as process issued out of the courts of oyer and terminer and jail delivery, and to be directed to the sheriff of his county.¹

Every such precept shall mention the time and place at which said court is to be held, and shall command the said sheriff:

1. To summon the several persons who shall have been drawn in his said county to serve as grand and petit jurors at the said court, to appear thereat.

2. To bring before the said court all prisoners then being in

¹ 2 R. S., 206, § 22.

the jail of such county, together with all process and proceedings any way concerning them, in the hands of such sheriff.

3. To make proclamation in the manner prescribed by law, notifying all persons bound to appear at the said court, by recognizance or otherwise, to appear thereat, and requiring all justices of the peace, coroners, and other officers who have taken any recognizance for the appearance of any person at such court, or have taken any inquisition, or the examination of any prisoner or witness, to return such recognizances, inquisitions and examinations to the said court at the opening thereof, on the first day of its sitting.¹

The sheriff to whom any such precept shall be directed and delivered, immediately on the receipt thereof, shall cause a proclamation in conformity thereto, signed by him, to be published once in each week until the sitting of the court, in one or more of the newspapers printed in the said county. The expense of such publication shall be a county charge.²

In regard to courts of sessions, it is provided by statute that it shall not be necessary for any precept to be issued to the sheriff to summon any grand jury for the court of sessions.³

The general term of the Supreme Court, in the Third Judicial district, have held that it is no good cause of complaint on the part of the defendant that no precept was issued by the district attorney to the sheriff, previous to the sitting of the oyer and terminer, and that its omission is not an irregularity of which any body can take advantage, and by one of the judges it was said that no such precept is now necessary for a regular court of oyer and terminer,⁴ while at the Onondaga general term, it was held that, to give validity to proceedings in the oyer and terminer, it is necessary that process for summoning the petit jury should be issued, and that it should also be returned and filed in the office of the clerk of the county, and that the issuing of the precept is necessary to give validity to the acts of the grand jury;⁵ and conflicting decisions have also been made as to whether the defend-

¹ 2 R. S., 206, § 23.

² 2 R. S., 206, § 24.

³ 2 R. S., 724, § 25.

⁴ *Peo. v. Cummings*, 2 Park. 343.

⁵ *McGuire v. Peo.*, 1 Park., 148.

ant may, after verdict, on error, avail himself of the objection that no precept had been issued for summoning the grand jury.¹

§ 2. PROCLAMATION BY CRIER OF THE COURT.

Upon the convening of the court at the time and place mentioned for its session, the first business done is the proclamation by the crier of the court. The county judge of each of the counties in this State is authorized to appoint, from time to time as shall be necessary, a suitable person to discharge the duties of crier of the courts of record to be held in and for said county; such person to be paid the same compensation as justices of the court of sessions are paid, and to hold his office during the pleasure of said county judge.²

The proclamation is made as follows:

"Hear ye, hear ye, hear ye. All manner of persons that have any business to do at this circuit court and court of oyer and terminer (or court of sessions), held in and for the county of Rensselaer, let them draw near and give their attendance and they shall be heard.

"Sheriff of the county of Rensselaer, return the writs and precepts to you directed, and delivered and returnable here this day, that the court may proceed thereon.

"All justices of the peace, coroners, sheriffs and other officers who have taken any recognizances, examinations or other matters, return the same to the court here that they may proceed thereon.

"Hear ye, hear ye, hear ye. All manner of persons who are bound by recognizances to prosecute or prefer any bill of indictment against any prisoner or other person let them come forth and prosecute, or they will forfeit their recognizances."

§ 3. CALENDAR OF PERSONS CONFINED IN JAIL TO BE FURNISHED COURTS OF OYER AND TERMINER AND OF SESSIONS.

It is the duty of the keeper of every county prison or common jail to present to every court of oyer and terminer and to every court of sessions held in his county, at the opening of such court, a calendar, stating:

1. The name of every prisoner then detained in such prison.

¹ *McGuire v. Peo.*, 1 Park., 148; *Peo. v. Robinson*, 1 Park., 235.

² *Laws 1855*, ch. 530.

2. The time when such prisoner was committed, and by virtue of what process or precept; and,

3. The cause of the detention of every such person.¹

It is generally customary for the sheriff of the county to furnish duplicates of the above mentioned calender or jail list, as it is usually called; one of which is for the use of the court, and the other for the convenience of the district attorney and grand jury. Although not required by the statute, it is usual for the sheriff to attach to the duplicate list furnished for the grand jury, the names of the officers making the arrest, in order that they may know what officer has charge of the case and to whom to apply for information concerning the witnesses.

The common jail in the several counties of the State are kept by the sheriffs of the counties in which they are respectively situated, and are used as prisons, for the detention of persons duly committed, in order to secure their attendance as witnesses in any criminal case; for the detention of persons charged with crime and committed for trial; for the confinement of persons duly committed for any contempt or upon civil process, and for the confinement of persons sentenced to imprisonment therein upon conviction for any offence.²

§ 4. EMPANNELLING THE GRAND JURY.

After the proclamation made by the clerk, the next business usually transacted in courts of oyer and terminer, and courts of sessions is the empannelling of the grand jury. This is done by the clerk calling the names of the jurors separately from the original panel of the drawing, certified to by the proper officers, and to which has been attached the return of the sheriff, showing what jurors have been summoned to attend the court. As the names of the jurors who have been summoned are called, they answer to their names, and step forward and take their places in the seats reserved for them. Before the calling of the jurors' names by the clerk, the following proclamation is made by the crier of the court:

" You good men who are here, returned to inquire for the people of the State of New York, for the body of the county of

¹ 5th ed. R. S., vol. 3, p. 1066, § 25.

² 5th ed. R. S., vol. 3, p. 1061, § 1.

Rensselaer, answer to your names, every one at the first call, and save your fines."

§ 5. OF THE GRAND JURY.

The Constitution of the United States provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia in actual service.¹ And in our State Constitution there is a similar provision, except in cases of impeachment and in cases of militia when in actual service, and the land and naval forces in time of war, or which the State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny under the regulation of the Legislature.² The number of grand jurors sworn upon any panel, shall not be more than twenty-three, and not less than sixteen persons.³ The grand jury itself is of Saxon origin, and is found accurately described as early as the laws of King Ethelred.⁴ In case it becomes desirable to prosecute a person for the commission of a crime in a court of record, it becomes necessary that the preliminary steps should be taken by a proper presentment of the case to a grand jury, and have an indictment therefor presented by them to the court, upon which the accused is arraigned and tried, as will be hereinafter spoken of.

And as a preliminary action to such presentment and indictment, the accused may be arrested at any time upon a warrant charging him with the offence.⁵ And he may have had an examination upon such arrest, and been discharged, or he may have been committed to jail to await the action of the grand jury, or he may have been let to bail after such arrest, to await the action of the grand jury, and for his appearance at court to answer any indictment they may find against him, or no proceeding whatever may have been instituted against him prior to the summoning and appearance of the witnesses before the grand jury. In all of these cases the grand jury have a right to hear and examine witnesses in relation to the offence charged to have been commit-

¹ U. S. Const., Art. 5.

² Const. N. Y., Art. 1, § 6.

³ 2 R. S., 724, § 26.

⁴ 4 Blac. Com., 302; Wilk. L. L., Angl. Saxon, 117.

⁵ Ante.

ted, and if, in their opinion, the evidence warrants it, to find a true bill of indictment against the guilty person, or if there be not sufficient evidence, then to ignore the bill and dismiss the case from further consideration.

The qualifications of the grand jurors, and the cases in which persons are to be discharged and excused from the performance of such jury duty, are the same as those of petit jurors. They are to be such persons as the supervisors know or have good reason to believe are possessed of the qualifications by law required of persons to serve as jurors for the trial of issues of fact, and are of approved integrity, fair character, sound judgment, and well informed. This question will be found treated of in subsequent pages.¹ But it is not necessary that they should be freeholders.²

§ 6. OF THE RETURN AND SUMMONING OF THE GRAND JURORS.

The manner of selecting and returning grand jurors is pointed out by the statute. In the city and county of New York, the mayor, recorder and aldermen prepare a list of persons to serve as grand jurors.³ In the county of Kings the supervisors of that county prepare a list of grand jurors from the names of persons qualified as jurors, to be provided by the commissioner of jurors in that county,⁴ and in the other counties of the State the supervisors of the county prepare the list of persons to serve as grand jurors in their respective counties.⁵ The names of such persons are placed upon ballots kept in a box in the office of the county clerk. The manner of drawing the names of persons who are to serve as grand jurors, and the summoning of such persons to attend the courts for which they are drawn, will be found pointed out by the provisions of the Revised Statutes.⁶

If any offence shall be committed during the sitting of any court of oyer and terminer or court of sessions, after the grand jury shall have been discharged, such court may, in its discretion, by an order to be entered in its minutes, direct the sheriff to

¹ Vide post. 2 R. S., 722, § 14; Id., 720, §§ 3-4.

² *Peo. v. Jewett*, 6 Wend., 388.

³ 2 R. S., 720, § 2.

⁴ *Laws* 1858, ch. 322, § 30.

⁵ 2 R. S., 720, § 1.

⁶ Vide 5th ed., R. S., vol. 3, p. 1012, et seq.; *Laws* 1847, ch. 495, p. 734; *Laws* 1858, ch. 322, p. 517.

summon another grand jury, and the sheriff shall accordingly forthwith summon such other jury from the inhabitants of the county qualified to serve as petit jurors, who shall be returned and sworn, and shall proceed in the same manner in all respects as provided by law in respect to other grand juries.¹

It was held not to be a sufficient reason for quashing an indictment, that the list of persons from which the grand jury which found it was drawn, contained, as originally preferred by the board of supervisors, the names of only two hundred and ninety-nine persons, instead of three hundred, as required by statute.²

§ 7. OF HEARING EXCUSES BY THE GRAND JURORS.

The court then usually inquires if any of the grand jurors have excuses to make, and proceeds to hear and determine upon the validity of the excuses offered. The juror presenting himself to offer an excuse, is first sworn by the clerk.

The following oath is administered to the juror upon his application for a discharge:

"You shall true answers make to such questions as shall be put to you touching your application to be discharged from attendance as a juror at this court, so help you God."

The court may discharge any person from serving as a grand juror in the same cases in which petit jurors may by law be discharged.³

When any grand juror shall have attended and performed his duty as such at any court, the ballot containing his name shall be destroyed, and he shall not be again required to serve as a grand juror during the year for which his name was returned.⁴

And when any person drawn as a grand juror shall be discharged by the court or excused from attending on account of any disqualification, or for any other cause not being of a temporary nature, the ballot containing his name shall be destroyed.⁵

§ 8. OF CHALLENGES TO THE GRAND JURORS.

In this State no challenge to the array of grand jurors or to any

¹ 2 R. S., 725, §§ 34, 35.

² *Peo. v. Harriot*, 3 Park., 112.

³ 2 R. S., 722, § 14. See post.

⁴ 2 R. S., 722, § 16.

⁵ 2 R. S., 722, § 17.

person summoned to serve as a grand juror, shall be allowed in any other cases than the following, viz: A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror before he is sworn, on the ground that he is a prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpoenaed or bound in a recognizance as such, and if such objection be established the person so summoned shall be set aside.¹

§ 9. OF TALESMEN FOR THE GRAND JURY.

It sometimes happens that, from failure to appear or by reason of persons, who have been summoned as grand jurors, being challenged, discharged or excused, there is not a quorum of jurors present to transact business.

The Revised Statutes provide that if at any court of oyer and terminer or court of sessions, there shall not appear at least sixteen persons duly qualified to serve as grand jurors who shall have been summoned for that purpose, or if the number of grand jurors attending shall be reduced below sixteen, by any of them being discharged or otherwise, such court may, by an order to be entered in its minutes, direct the sheriff of the county to summon the number of persons necessary to complete the grand jury for such court.²

The sheriff shall summon such persons accordingly, who shall be bound forthwith to attend and serve, unless excused by the court, in the same manner and subject to the same penalties for neglect as persons duly drawn by the county clerk and summoned by the sheriff as herein provided.³

These talesmen are usually selected by the sheriff from persons in attendance at the court, who possess the necessary qualifications of jurors.

§ 10. APPOINTMENT OF A FOREMAN TO THE GRAND JURY.

From one of the jurors summoned and appearing the court appoints a foreman, and the court also appoints a foreman in

¹ 2 R. S., 724, §§ 27, 28; 3 Wend., 313.

² 2 R. S., 723, § 23.

³ Id., § 24.

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⁵ 2 R. S., 722, § 17.

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² 2 R. S., 723, § 23.

³ Id., § 24.

every case where such person so appointed shall be discharged or excused before the grand jury are dismissed.¹

§ 11. OF THE OATH TO THE GRAND JURY.

A quorum of jurors having been obtained, and one of their number having been selected by the court as their foreman, the clerk proceeds to administer to them the oath, in the following form:

Oath of Foreman.

You, A B, as foreman of this grand inquest, shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel for the people of this State, your fellows and your own, you shall keep secret; you shall present no one from envy, hatred or malice; nor shall you leave any one unrepresented through fear, favor, affection, or hope of reward; but you shall present all things truly as they come to your knowledge, according to your understanding; so help you God.

Oath of the other members.

The same oath which your foreman has taken on his part, you, and each of you, shall, well and truly observe and keep on your part, so help you God.

It will be observed that the foregoing oath contains a promise of secrecy. The Revised Statutes further provide that no grand juror, constable, district attorney, clerk or judge of any court, shall disclose the fact of any indictment having been found against any person for a felony not in actual confinement, until the defendant in such indictment shall have been arrested thereon; and every person violating such provision, shall be deemed guilty of a misdemeanor.²

Grand jurors being sworn to secrecy, what takes place before them cannot generally be disclosed; besides the exception to this rule by the statute authorizing grand jurors to be examined in prosecutions for perjury, and to show that a witness has contradicted on the trial what he has sworn to before the grand jury,³ a grand juror may be asked who was the prosecutor of a certain indictment; but a grand juror cannot be called upon to impeach

¹ 2 R. S., 724, § 26.

² 2 R. S., 726, § 39

³ 2 R. S., 724, § 31.

the conduct of the grand jury, as for example to show that an indictment presented by them was found without testimony, or upon insufficient testimony.¹

§ 12 THE JUDGE'S CHARGE.

The grand jury having been sworn, the presiding judge then proceeds to, as it is technically termed, charge the jury. This usually consists of a brief rehearsal of the powers and duties of grand jurors, and the method of transacting such business as may be brought before them. The following is an extract from a charge delivered to a grand jury by Recorder HOFFMAN, of New York city:

"The solemn oath which you and each of you have just taken, defines in clear, concise and forcible language your duties, and the manner and spirit in which you are expected to perform them. In your selection, due regard has been had to your character and position in the community of which you are a part, and to your fitness and capacity for the labors and trusts which the law imposes upon you. You form an important element in the organization of this court, for without your action, no criminal, high or low, can be brought to trial and to judgment. You stand between the citizen and the State, sworn to do justice to both, and to see that no injustice is done to either. In the language of another, 'To you is committed the preservation of the peace of the country, the care of bringing to light, for examination, trial and punishment, all violence, outrage, indecency, and terror—everything that may occasion danger, disturbance or dismay to the citizens. You are watchmen stationed by the laws to survey the conduct of your fellow citizens, and to inquire when and by whom public authority has been violated, or the Constitution and the laws infringed.'

"You understand, gentlemen, that it is your province to inquire concerning all crimes committed within the jurisdiction of this court, and that no person charged with the commission of a felony can be brought to trial until his case is investigated by a grand jury."

Previous to the judge's charge, the crier of the court makes the following proclamation: "All persons are strictly charged

¹ *Peo. v. Hulbut*, 4 Den., 133.

and commanded to keep silence while the court is giving the charge to the grand jury, on pain of imprisonment."

By special enactment, it is made the duty of courts of justice to charge the grand jury to inquire especially into violations of the statutes respecting usury—the demanding, charging or receiving fees by public officers to which they are not entitled by law, the election laws, the act to suppress intemperance and to regulate the sale of intoxicating liquors, the laws against lotteries and the unlawful selling of lottery tickets, and, in the counties of Erie, Albany and New York, of the act to prevent frauds in the sale of tickets upon vessels.¹

In charging grand juries it is also further provided by statute that the court shall apprise them of the provisions of the statute above referred to, respecting the disclosure of the fact that an indictment has been found.²

§ 13. OF THE SELECTION OF A CLERK TO THE GRAND JURY.

The grand jury having been sworn and charged, retire, with the district attorney, to some convenient place. Here they, as it is termed, organize, by the selection of a clerk, and proceed to the transaction of business. The Revised Statutes provide that every grand jury may appoint one of their number to be a clerk thereof, to preserve minutes of their proceedings, and of the evidence given before them, which minutes shall be delivered to the district attorney of the county, when so directed by the grand jury.³

The district attorney or clerk generally first prepare a list of the jurors, showing the number of miles they have respectively travelled as jurors, which list is handed to the clerk of the court to compute their fees for mileage and attendance as jurors, for the subsequent use of the county treasurer in paying them for their services after the jury has been discharged.

A clerk having been appointed, the jury become, as it is termed, organized, and are ready for the transaction of any business that may come before them.⁴

¹ R. S., 5th ed., vol. 1, p. 449, § 15; 1 R. S., 672, § 48; Id., 677, § 30; Id., 773, § 16; 2 R. S., 651, § 8; Laws 1860, ch. 103, § 8, p. 177.

² 2 R. S., 726, § 41.

³ 2 R. S., 724, § 30.

⁴ Vide 10 How., 567.

§ 14. OF THE PROCEEDINGS HAD BEFORE THE GRAND JURY.

The proceedings before the grand jury are of an *ex parte* nature. The accused has no right to be present, personally or by counsel, and their inquiry is carried on in secret. Most of the provisions regulating the proceedings had while the jury are in session are the subject of statutory enactment, and will be found mentioned below.

In some cases parties will present themselves voluntarily before the grand jury as witnesses concerning the commission of crime, and in other cases, during the session of the grand jury, persons will appear voluntarily as complainants, either to the foreman or to the district attorney, and request that subpoenas may be issued by the district attorney to compel the attendance of witnesses; again, witnesses may be bound by recognizance, entered into before justices of the peace and coroners, to appear and give evidence before the grand jury. It is the duty of the district attorney, both before and during the session of the grand jury, to obtain from the office of the county clerk, all recognizances for the appearance of witnesses before the grand jury, and see that their attendance is compelled; also all recognizances requiring prisoners to appear and answer to any indictment that may be found against them, in order that he may know the names of offenders and the offences with which they are charged, and of all persons who have been arrested for indictable offences and let to bail since the last grand jury; and, in some cases, it is also advisable to correspond with the officers taking the bail, both to ascertain the names and residences of witnesses and the seriousness of the offence. In cities, where many offenders are arrested for indictable offences, it will be found very convenient for the magistrate, at the time the prisoner is brought before him, to fill up and return to the district attorney a blank, stating the name of the offender, nature of the offence, names and residence of the witnesses, name of the officer having the case in charge, whether committed or bailed, and if bailed the names and residences of the sureties, with such additional remarks as may suggest themselves to the magistrate.

The district attorney should also procure from the county clerk all inquisitions filed by coroners and criminal examinations taken before magistrates, for the assistance of himself and the jurors in the examinations of cases before them. An examina-

tion of the sheriff's lists of prisoners charged with crime and confined in jail, will also acquaint the jurors with the names and nature of the offences of those persons requiring their attention

The foreman of every grand jury, from the time of his appointment to his discharge, shall be authorized to administer any oath, declaration or affirmation, in the manner prescribed by law, to any witness who shall appear before such grand jury for the purpose of giving evidence in any matter cognizable by them.¹

Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them, for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and to issue subpoenas and other processes to bring up witnesses.²

In the absence of the district attorney this is generally done by the foreman, but it is not only the privilege but the duty of every grand juror to ask such questions of the witnesses as will, in his judgment, elicit the truth touching the matters before them.

The district attorney of the county shall be allowed at all times to appear before the grand jury, on his request, for the purpose of giving information relative to any matter cognizable by them, and may be permitted to interrogate witnesses before them when they shall deem it necessary; but no district attorney, constable or other person, except the grand jurors, shall be permitted to be present during the expression of their opinions, or the giving of their votes upon any matter before them.³

It is generally customary for the district attorney to appear before the grand jury, except during their deliberations after the testimony is closed, and by courtesy, and for the sake of dispatch, he generally conducts the examination of the witnesses.

The minutes taken before the grand jury are used by the district attorney in drawing the indictment, and afterwards to assist him in conducting the examination of the witnesses upon the trial of the accused.

The clerk should keep the minutes of each case on separate sheets of paper, by themselves, entitled at the top with the name of the person against whom the complaint is made, and the

¹ 2 R. S., 724, § 29.

² 2 R. S., 724, § 32.

³ 2 R. S., 725, § 33.

nature of the offence charged, and should mark at the bottom of the minutes, "Bill" or "No Bill," as the case may be.

It will be also found advisable for the foreman to keep a list of his own of the cases presented before the jury, consisting of the name of the offender, nature of the offence charged, and the fact whether an indictment is found or not, for his own convenience, as he will be required to indorse his name as foreman under the words "a true bill," upon all indictments which are found. These are drawn by the district attorney, and are not generally presented to the foreman for his signature until at or near the close of the session, unless some special reason, as the immediate arrest or trial of the party requires that they should be sooner presented to the court.

The proceedings before a grand jury are not proceedings before a judicial body, within the meaning of chap. 130, laws of 1854, and the publication of such proceedings is not privileged.¹

Where the testimony of witnesses is relied on, the grand jury ought to be satisfied only with such as is good in law, and sufficient to establish a *prima facie* case, and they ought not to find an indictment unless the testimony against the accused *ex parte* and unexplained, is sufficient to convict.²

No indictment can be found without the concurrence of at least twelve grand jurors, and when so found, and not otherwise, the foreman of the grand jury shall certify under his hand that such indictment is a true bill.³

In cases where a person shall have escaped indictment on the ground of insanity, it is the duty of the grand jury to certify the fact to the court, who shall carefully inquire and ascertain whether his insanity, in any degree, continues, and if it does, order him into custody, and to be sent to the asylum.⁴

The attendance of witnesses before the grand jury is enforced by process of subpoena and attachment. The subpoena is subscribed by the district attorney, and no seal is necessary to it. When subscribed by the district attorney issuing the same, it is as valid and effectual as if the seal of the court at which any witness named therein is required to appear had been affixed thereto.⁵

¹ McCabe v. Cauldwell, 18 Abb., 377.

² Peo. v. Hyler, 2 Park., 570.

³ 2 R. S., 726, § 36.

⁴ 5th ed. R. S., Vol. 2, p. 893, § 48; 8 O. & P., 195, post.

⁵ 2 R. S., 729, § 66.

In no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member voted on any question before them, or what opinions were expressed by any juror in relation to any such question.¹

A grand jury has full power to make inquiry and to present by indictment all persons charged with crime, whether such persons are or are not under arrest, and examination before any of the magistrates of the county; and where a corener's jury finds that a murder has been committed, and the coroner binds over the witnesses to appear at the next criminal court at which an indictment can be found, it is the duty of the grand jury to proceed at once to act upon the case, without reference to the facts whether the accused is in custody, or whether he is then under examination before the coroner.²

The provisions of the Revised Statutes, relative to the primary examination of persons accused of crimes, do not limit the right of the people, through their officers, to institute accusations before the grand jury, and it is no defence to an indictment that, previous to the complaint before the grand jury, there had been no preliminary proceedings before the magistrate.³

Neither is it an objection to an indictment that it was found while an investigation of the charge was pending before the committing magistrate.⁴

The practice of renewing a complaint before a subsequent grand jury after a previous grand jury have found an indictment is not to be countenanced. The accuser and the accused ought, as a general rule, to abide by the decision of the first grand jury who act upon the complaint. The court will discountenance the practice of finding two or more indictments for different degrees of the same offence, or for different offences founded on the same matter.⁵

§ 15. OF THE TIME WITHIN WHICH THE INDICTMENT MAY BE FOUND.

By the provisions of the Revised Statutes, indictments for mur-

¹ 2 R. S., 725, § 31.

² *Peo. v. Hyler*, 2 Park., 566.

³ *French v. Peo.*, 3 Park., 114.

⁴ *Peo. v. Horton*, 4 Park., 222; *Peo. v. Strong*, 1 Abb., N. S., 244; *Peo. v. Heffernan*, 5 Park., 393.

⁵ *Peo. v. Van Horne*, 8 Barb., 158.

der might be found at any time after the death of the person killed, and in all other cases, except those mentioned below, it was provided that the indictments should be found and filed in the proper court within three years after the commission of the offence, but the time during which the defendant should not have been an inhabitant or usually resident within this State, did not constitute any part of the said limitation of three years.¹

The exceptions above referred to are the following: In cases of seduction under promise of marriage, and of abduction for purposes of prostitution, and also for falsely personating another, and in such assumed character marrying another, the indictment is to be found within two years after the perpetration of the offence.²

In 1860 the Legislature amended the section of the Revised Statutes above referred to, by substituting in the place thereof the following enactment: Indictments for murder may be found at any time after the death of the person killed. In all other cases, indictments shall be found and filed in the proper court within three years after the commission of the offence, but the time during which the defendant shall not have been an inhabitant of or usually resident within the United States, shall not constitute any part of the said limitation of three years.³

§ 16. OF THE COUNTY IN WHICH THE INDICTMENT IS TO BE FOUND.

As a general rule, an indictment should not be found by the grand jury unless the offence was committed in the county in which they are in session. There are, however, several exceptions to this general rule, which we will proceed to mention.

Thus, when an offence is committed on the boundary of two counties, or within five hundred yards of such boundary, an indictment for the same may be found, and a trial and conviction thereon may be had in either of such counties.⁴

Also when any mortal wound shall be given, or any poison shall be administered, or any other means shall be employed in one county by which a human being shall be killed, who shall

¹ 2 R. S., 726, § 37.

² 2 R. S., 664, § 26; Id., § 27; Laws 1848, ch. 105; 2 R. S., 676, § 51.

³ Laws 1860, ch. 271, p. 474.

⁴ 2 R. S., 727, § 45.

die thereof in another county, an indictment for such offence may be found in the county where such death happened, and the same proceedings shall be had thereon in all respects as if the means by which such death was produced had been employed and used in the county where such death happened.¹

An indictment against an accessory to any felony may be found in the county where the offence of such accessory shall have been committed, notwithstanding the principal offence was committed in another county, and the like proceedings shall be had thereon in all respects as if the principal offence had been committed in the same county.²

An accessory may be indicted and tried in the county where the offence of the accessory was committed, notwithstanding the principal offence was committed in another county; but the accessory cannot be indicted and tried in the county where the principal offence was committed unless his offence as accessory was committed there.³

In the cases where any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding the theft was committed in another county.⁴

In cases of bigamy an indictment may be found against any person for a second, third or other marriage in the county in which such person shall be apprehended, and the like proceedings, trial, judgment and conviction may be had in such county as if the offence had been committed therein.⁵

In cases of bribery every person offending against the provisions of the statute may be indicted, tried and convicted in the county in which such offence shall be committed or in an adjoining county.⁶

In cases of offenders against the statute in relation to dueling, where the offenders left the State for the purpose of eluding the provisions of the statute, they may be indicted and brought to

¹ 2 R. S., 727, § 47.

² 2 R. S., 727, § 48.

³ *Baron v. The Peo.*, 1 Park., 246.

⁴ 2 R. S., 726, § 43. Vide 3 Park. Cr. R., 473.

⁵ 2 R. S., 688, § 10.

⁶ 2 R. S., 683, § 15.

trial in any county of the State, which shall be designated by the governor for that purpose, and where, in his opinion, the evidence can be most conveniently obtained and produced.¹

In cases of kidnapping the offence may be tried in the county in which the same may have been committed, or in any county through which any person kidnapped or confined shall have been taken while under such confinement.²

And indictments for selling blacks may be tried in any county in which the person of color sold, or whose services shall be transferred, shall have been taken, kidnapped or inveigled, or through which he shall have been carried or brought.³

When any offence shall have been committed within this State, on board of any vessel navigating any river, lake or canal, or in respect to any portion of the cargo, or lading of any such boat or vessel, an indictment for the same may be found in any county through which, or any part of which, such vessel shall be navigated in the course of the same voyage or trip, or in any county through which such river or canal passes, or in which such lake is situated, or which it borders, or in the county where such voyage or trip shall terminate, or would terminate, if completed; and such indictment may be tried, and a conviction thereon had, in any such county, in the same manner and with the like effect, as in the county where the offence was committed.⁴

But an indictment cannot be found in the county of New York for an offence committed on board of a steamboat close to the Long Island shore in Suffolk county, upon a trip from the city of New York to Norwich in the State of Connecticut; for the Long Island Sound, except such portions of it as are within *fauces terrae*, is part of the seas, and without the jurisdiction of the State.⁵

The phrase "navigating a river, &c.," used in the statute relating to offences committed on board of vessels, should be used in reference to the understanding of persons engaged in the business of navigation; accordingly, where a vessel had started on her voyage and still intended prosecuting it, though, when the

¹ 2 R. S., 687, § 6.

² 2 R. S., 664, § 31.

³ 2 R. S., 665, § 35.

⁴ 2 R. S., 727, § 44 as amended; Laws of 1860, ch. 431, p. 750.

⁵ *Manly v. Peo.*, 3 Seld., 295.

offence was committed and for two days previous, she was lying at anchor in a river by adverse winds, it was held, nevertheless, that she was navigating the river within the meaning of the statute, and if the offence be committed while the vessel is in a river, prosecuting her voyage, the case is within the statute, even though the port of departure and destination are both upon other waters. The statute should not be construed as authorizing any unnecessary departure from the common law rule respecting the venue in criminal cases.¹

It has, therefore, been held where, at the time of the commission of the offence, the vessel was navigating a river and her port of destination, which she finally reached, was upon the ocean in a county beyond the mouth of the river, that no indictment lay in such county, but only in some county through which or a part of which the vessel passed while on the river. In relation to crimes on board of vessels navigating a river, it may often be nearly or quite impossible to ascertain in what particular county the offence was committed, and this difficulty might lead to the acquittal of the accused, although his guilt should be fully established, and this was the mischief against which the statute was principally directed.²

Also whenever any nuisance shall be erected or continued on or near the boundary lines of New York, Westchester and Queens, the same, and the persons by whom such nuisance shall have been erected or continued may be indicted in either county injuriously affected thereby, and thereupon the same proceedings shall be had and taken, and the sentence of the court may be enforced in the same manner as if the said nuisance was situated within the county in which the indictment was found.³

At common law, larceny, like every other offence, must regularly be tried in the same county or jurisdiction in which it was committed; but it should be noted with respect to larceny, that the offence is considered as committed in every county or jurisdiction into which the thief carries the goods, for the legal possession of them still remains in the true owner, and every moment's continuance of the trespass and felony, amounts to a new caption and asportation.⁴

¹ *Peo. v. Hulse*, 3 Hill, 309.

² *Id.*

³ Laws 1851, ch. 415, § 1.

⁴ 4 *Blao. Com.*, 304; 3 *Inst.*, 113; 2 *Hale*, 163, 1 *Hale*, 507, 508; 1 *Hawk. P. C.*, ch. 33, § 52; 2 *Russ. on Cr.*, 116.

The larceny may, however, in some respects, be considered as a new larceny, and as not necessarily including all the qualities of the original larceny; therefore, if the thing stolen is altered in character in the first county, so as to be no longer what it was when stolen, an indictment in the second county must describe it according to its altered and not according to its original state. Thus, where an indictment was preferred in H for stealing live turkies, and it appeared that they were stolen alive in C, killed there and carried dead into H, it was held that, though the carrying into H constituted a larceny in that county, yet it was a new larceny there, and a larceny of dead turkies, not of live ones.¹

Also an indictment in the county of H for stealing one brass furnace, is not supported by evidence that the prisoner stole the furnace in the county of R, and there broke it to pieces and brought the pieces into the county of H.²

At common law, if a compound larceny, as robbing the mail be committed in one county, and the offender carry the property into another, though he might be convicted in the latter county of the simple larceny, he could not there be convicted of the compound larceny.³

But by statute in this State, it is provided that when property stolen in one county and brought into another, shall have been taken by burglary or robbery, the offender may be indicted, tried and convicted for such burglary or robbery in the county into which such stolen property was brought, in the same manner as if such burglary or robbery had been committed in that county.⁴

Where property is burglariously stolen in one county, and the offender is apprehended and committed for such offence to the jail of another county, if he is indicted in the county where the property was stolen, the court will, on the application of the district attorney of that county, award a habeas corpus to bring up the prisoner so that he may be delivered to the sheriff of the county within which the property was stolen and there tried.⁵

It is also further provided by statute that every person who

¹ Russ. & Ry., 497.

² R. v. Holloway, 1 C. & P., 127.

³ Rex v. Thompson, Hil. T., 1795.

⁴ 2 R. S., 727, § 50; Haskins v. Peo., 16 N. Y. (2d Smith), 344.

⁵ Peo. v. Mason, 9 Wend., 505.

shall feloniously steal the property of another in any other State or country, and shall bring the same into this State, may be convicted and punished in the same manner as if such larceny had been committed in this State; and in every such case, such larceny may be charged to have been committed in any town or city, into or through which such stolen property shall have been brought.¹

And under this section of the statute, it was held that a foreigner committing larceny abroad coming into this State, and bringing the stolen property with him, might be indicted, convicted and punished in the same manner as if the larceny had been originally committed here.²

Where property is stolen in one county and afterwards carried by the thief into another county, the prisoner must have the property under his control in the second county to render him liable to be indicted there, and it is not enough that he has the mere possession of it, he being in the custody of the constable who apprehended him.³

Every person prosecuted for stealing the property of another in any other State or territory, and bringing the same into this State, may plead a former conviction or acquittal for the same offence in another State or country, and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offence.⁴

The rule that where property is stolen in one county and is carried by the thief into another, he may be convicted of larceny in the latter county, applies as well to property which is made the subject of larceny by statute as to property which is the subject of larceny by the common law.⁵

A man may be indicted for larceny in the county into which the goods are carried, although he did not himself carry them thither. Thus, where C and D stole the goods in the county of S, and D carried them into the county of M, where C subsequently joined him, and concurred in securing them, it was held larceny in both.⁶

¹ 2 R. S., 699, § 4.

² *Peo. v. Burke*, 11 Wend., 129.

³ *Rex v. Simonds*, R. & M. C. C. R., 408.

⁴ 2 R. S., 698, § 5.

⁵ *Com. v. Rand*, 7 Met., 475.

⁶ *R. v. County*, 2 Russ. by Grea., 118.

In cases where a libel has been published in any paper in this State against any person residing therein, the accused shall be indicted and the trial thereof had in either the county where the paper was published or in any county where the party libelled shall reside, and in cases where a libel is printed or published against any person not a resident of the State, the accused is to be indicted and the trial thereof had in the county where the libel was printed and published, and in cases where the paper shall not, upon its face, purport to be or have been printed and published in a particular county of this State, the accused may be indicted and the trial thereof had in any county where the paper has been circulated. But a defendant shall not be indicted for the printing or publication of a single libel in more than one county of the State.¹

Where threatening letters are written and mailed in one county, and directed to and received by the person to whom they are addressed in another county, the indictment for sending such letters should be found in the latter county.²

§ 17. OF THE PRESENTMENT OF THE INDICTMENT.

Indictments found by a grand jury shall be presented by their foreman in their presence to the court, and shall there be filed and remain as public records; but such as are found against any person for a felony not being in actual confinement shall not be open to the inspection of any person, except the district attorney, until the defendants therein respectively shall have been arrested.³

It is customary for the jury, at the conclusion of their labors, to enter the court in a body, whereupon the clerk calls their names to see if a quorum are present; the foreman thereupon presents the indictments properly endorsed by him to the court. The court inquires of the foreman if the jury have any further business to transact; if they have, they again retire to transact it, and if they have concluded the business before them they are discharged, with the thanks of the court. The foreman of the grand jury should certify under his hand that such indictment is a true bill.⁴

¹ 2 R. S., 731, §§ 80-81-82; Laws 1852, ch. 165.

² *Peo. v. Griffin*, 2 Barb., 427.

³ 2 R. S., 726, § 38.

⁴ 2 R. S., 726, § 36.

Under the above provision of the statute in regard to the indictment not being open to the inspection of any person, except the district attorney, where the indictment is for a felony and the person against whom it is found is not in actual confinement, it is customary to present what is called a sealed indictment; that is, the indictment is enclosed in an envelope and sealed up, and after being marked as a sealed indictment, stating the court and term in which it is found, it is in that manner presented to the court. The clerk, in making the entry of its presentment upon the records of the court, instead of stating the name of the offender and character of the offence, as is customary in other cases, simply enters it among the list of other indictments as a sealed indictment. It is well enough for the district attorney, in all cases of sealed indictments, to number them in addition upon the outside of the envelope, by which means, when the person indicted has been arrested, he can identify the indictment against him without the necessity of opening other indictments which are also sealed.

No grand juror, constable, district attorney, clerk or judge of any court shall disclose the fact of an indictment having been found against any person for a felony not in actual confinement, until the defendant in such indictment shall have been arrested thereon, and every person violating the above provision shall be deemed guilty of a misdemeanor.¹

The above provision, however, does not extend to any district attorney, sheriff or other officer making any such disclosure by the issuing or in the execution of any process on such indictment, or in any other way, when it shall become necessary in the discharge of any official duty.²

¹ 2 R. S., 726, § 39.

² 2 R. S., 726, § 40.

SECTION II.

OF THE PROCEEDINGS FROM THE PRESENTMENT OF THE INDIOTMENT DOWN TO THE TRIAL.

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§ 18. COMPROMISING CERTAIN OFFENCES AFTER INDICTMENT FOUND.

If an indictment shall be found on any charge for assault and battery or other misdemeanor, for which the injured party shall have a remedy by civil action, such injured party may appear in the court where such indictment is pending, and acknowledge in writing that he has received satisfaction for the injury and damage done him, and such court may, in its discretion, on payment of the costs incurred, order that no further proceedings be had on such indictment, and may discharge the defendant therefrom, which order shall operate as a perpetual stay of all further proceedings on such indictment.¹

The above provisions do not extend to any indictment for any assault and battery or other misdemeanor, charged to have been committed:

1. By or upon any officer or minister of justice, whilst in the execution of the duties of his office; or,
2. Riotously; or,
3. With an intent to commit a felony.²

Misdemeanors ought not to be compromised without the advice and consent of the district attorney;³ and they cannot be so compromised after conviction.⁴

§ 19. PERSONS NOT INDICTED TO BE DISCHARGED.

Within twenty-four hours after the discharge of any grand

¹ 2 R. S., 730, § 72.

² 2 R. S., 730, § 73.

³ *Gilmore's Case*, 2 City, H. Rec., 9. Vide 3, Id., 139, as to challenging to fight a duel.

⁴ *Peo. v. Bishop*, 5 Wend., 112.

jury, it shall be the duty of such court to cause every person confined in the county prison upon any criminal charge, who shall not have been indicted, to be discharged without bail, unless satisfactory cause shall be shown to such court for detaining such person in custody or upon bail, as the case may require, until the meeting of the next grand jury in such county.¹

In case of the inability of the district attorney to procure the attendance of witnesses before the grand jury, he should make an affidavit of that fact and of the circumstances of the case, showing also reasonable ground for believing that the witnesses could be procured before or at the next session of the grand jury to be held in the county, and apply to the court immediately upon the discharge of the grand jury for an order detaining such person in custody or upon bail until the meeting of the next grand jury in the county. It would also be well enough to state the leading facts in the case, showing also probable ground for believing that in case of the attendance of the witnesses an indictment would be found against the prisoner, and also that reasonable efforts had been made to procure the attendance of such witnesses before the grand jury which had been discharged.

In case of the discharge of the prisoner, the following proclamation is made by the crier:

"Hear ye, hear ye, hear ye? If any man can show cause why A B should stand longer imprisoned, let him come forth and he shall be heard, for he stands upon his discharge."

No cause being shown, the crier further proceeds:

"Hear ye, hear ye, hear ye! No cause being shown why A B should longer remain in custody of the sheriff of the county of Rensselaer, he is discharged."

Persons in jail, or bound by recognizance to appear and answer to an indictment to be found, are not of course entitled to a discharge. Although no indictment be found, their discharge rests in the discretion of the court.²

§ 20. DISCHARGED AND ACQUITTED PRISONERS NOT TO PAY FEES.

Every person discharged from prison, or from his recognizance, in consequence of no indictment being found against him, or in

¹ 5th ed. R. S., vol. 3, p. 1066, § 26.

² *Champlain v. Peo.*, 2 Com. (2 N. Y.), 82.

consequence of his not being brought to trial, and every person acquitted on trial, shall be discharged without being required to pay any fees.¹

§ 21. BRINGING THE PRISONER TO COURT FROM THE JAIL.

Whenever it shall be necessary for any purpose to bring any prisoner, confined in a county jail, before any court of oyer and terminer, or any court of sessions which may be sitting in such county, such court may, by order, and without issuing any writ of habeas corpus or other process, direct such prisoner to be brought before them accordingly.²

§ 22. OF THE BENCH WARRANT.

The defendant hitherto has up to this stage of the proceedings been supposed to have been either in custody, upon a warrant issued by a committing magistrate, and held to await the action of the grand jury, or else to have been let to bail by some officer, with or without an examination, or he may have been at liberty, no proceedings having been taken against him prior to the presentment of his case to the grand jury and the subsequent finding of an indictment by them. In the latter case, or where he has been called in court after the presentment and filing of the indictment and his bail has been forfeited, process is issued to compel his attendance in court for the purpose of being arraigned. This process is commonly called a bench warrant, because it was formerly issued by the judge who sat upon the bench, but it may now be issued by the district attorney of the county where the indictment was found, as well as by the court. The following are the provisions of the statute in relation thereto:

A warrant for the arrest of any defendant indicted, may be issued by the court to which such indictment shall be presented, or by any justice of the Supreme Court, or judge of the county courts of the county in which such indictment shall be found, either in vacation or during the sitting of such court.³

A warrant for the arrest of the defendant indicted, may also be issued by the district attorney at any time after such indictment shall be found, but such warrant shall not be issued by any other officers than those above named.⁴

¹ 2 R. S., 747, § 45.

² 2 R. S., 728, § 57.

³ 2 R. S., 748, § 46.

⁴ Id.; Laws 1847, ch. 338.

§ 23. BENCH WARRANT, HOW DIRECTED.

By the Revised Statutes it is provided that every bench or district attorney's warrant may be directed to the sheriff or constables of any county in this State, and when the same shall be served in any county other than that in which the indictment shall be found, the same proceedings shall be had as on an indorsed warrant issued before the indictment, as prescribed in title two, chapter two, article two, part four, of the Revised Statutes.¹

In the capital police district, comprising portions of the counties of Albany, Rensselaer and Schenectady, bench warrants and other criminal process, are to be served by members of said police force, instead of by the sheriff and constables of the county.²

The members of the metropolitan police in that district, have also the common law and statutory powers of constables, except for the service of civil process.³

§ 24. ARREST UPON BENCH WARRANT.

It is the duty of the officer holding the bench warrant, upon the arrest of the prisoner, to convey him before the court having jurisdiction to try the indictment, and if such court be not in session, to leave him in the custody of the keeper of the common jail of the county, where such indictment was found. If the warrant is served in any county, other than that in which the indictment was found, the same proceedings are to be had as on an indorsed warrant issued before the indictment.⁴ Thus, where a defendant was arrested in one county under a bench warrant duly issued on an indictment in another county, he cannot be let to bail in the former county; he must first be carried to the county where the warrant was issued.⁵

The proceedings had upon indorsed warrants before the indictment, will be found spoken of in a previous chapter.⁶

¹ 2 R. S., 728, § 58; Laws 1830, ch. 320, § 62. Vide ante.

² Laws 1865, ch. 554, § 41; Laws 1866, ch. 483.

³ 5th ed R. S., vol. 2, page 1006, § 8.

⁴ 2 R. S., 728, §§ 57, 58.

⁵ Matter of Gorsline, 21 How. Pr., 85 10 Abb., 282; Sichel v. Chapman, 30 How., 202. Vide 6 Hill, 344.

⁶ Vide ante.

If the defendant in the indictment be already in prison upon another charge, the officer should leave his bench warrant with the keeper of the prison, in whose custody he remains. By this means it will appear upon the calendar that he is charged with two offences, and if acquitted on that for which he was first committed, his discharge will be prevented, and if the offence was committed in another county, he may be sent thither to take his trial.¹

And where the prisoner is committed to the custody of the sheriff of the county where the indictment is found, the bench warrant should be left with the sheriff as his authority for the detention of the prisoner. The bench warrant, besides authorizing the arrest of the defendant, contains a clause requiring the keeper of the common jail of the county where the indictment was found, to receive the defendant into his custody, and safely keep him until discharged by law. The officer delivering the prisoner and bench warrant to the sheriff or jailor, generally takes from him a receipt for the body of the prisoner, which is commonly known as a jail receipt.

§ 25. OF THE ARREST OF THE DEFENDANT WHERE HE HAS FLED FROM THE STATE.

In case the officer holding the bench warrant should learn that the defendant has fled to another State, the method of obtaining his arrest is by a requisition from the governor of this State upon the governor of the State where the prisoner may be found. For the proceedings in obtaining the requisition see the section entitled, "Of fugitives from justice, and the obtaining of requisitions for the arrest thereof upon the governors of other States."²

§ 26. OF COMPELLING THE APPEARANCE OF CORPORATIONS WHEN INDICTED.

Instead of arrest by a bench warrant it is provided that when an indictment shall be found against any corporation, a summons against the defendants may be issued and served in the same manner as provided by any statute in civil cases, and if such corporation do not appear according to the summons a *dis-tringas* may be issued, and levied upon their personal estate and

¹ 1 Chit. Cr. L., p. 66.

² Ante page, 77.

chattels real, and the issues levied thereon may be ordered to be sold, and the money arising therefrom shall be detained until such corporation appear and plead to the indictment, when it may be paid to them after deducting such costs and expenses incurred as shall be allowed by the court.¹

But if such corporation shall neglect to appear and plead to such indictment within two terms after the return of the *distingas* against them, the court shall order the money levied thereby, after deducting the costs and expenses of the proceedings, to be paid to the county treasurer for the use of the poor of such county.²

§ 27. OF THE ARRAIGNMENT OF THE DEFENDANT.

The grand jury having presented the indictment, and the prisoner having either been previously committed to jail and brought from thence to the court, or having been arrested upon a bench or district attorney's warrant, or having been at large upon bail and presented himself in court, is, as it is technically called, arraigned; that is, according to the old practice, the indictment was read over to him by the clerk of the court, and he was asked whether he was guilty or not guilty of the offence charged against him.³ The term arraignment signifies, calling the defendant to the bar of the court to answer the accusation contained in the indictment.⁴

In this State it is not usually the practice to read over the indictment to the prisoner by the clerk; he is generally informed by the district attorney in open court that he has been indicted for a certain offence, naming it, and stating generally the leading facts charged in the indictment in relation to the time and place, where the offence is alleged to have been committed, and the circumstances attending the commission of the offence as stated in the indictment, and is then asked by the district attorney whether he demands a trial upon such indictment.

Our statutes provide that, upon any defendant being arraigned upon an indictment, it shall not be necessary to ask him how he shall be tried, and instead of being required to say whether he

¹ 2 R. S., 747, § 42.

² Id., § 43.

³ 1 Stark Cr. Pl., 2d ed., 205-207.

⁴ 2 Hale, 216; 4 Blac. Com., 322.

pleads guilty or not guilty, he shall be required to say whether he demands a trial upon such indictment, and he may answer that he does require such trial, and for the purpose of all further proceedings such answer shall be deemed equivalent to a plea of not guilty. If he refuses to plead or answer, and in all cases where he does not confess the indictment to be true, a plea of not guilty shall be entered by the court, and the same proceeding in all respects shall be had as if he had pleaded not guilty to such indictment.¹

The object of an arraignment of a defendant is to establish his identity. It is a valid arraignment if the defendant is put to the bar of the court to answer and when so brought holds up his hand, and by subsequent acts admits his identity.²

The prisoner having been arraigned, besides his general plea of not guilty, either by demanding a trial or by refusal to plead or answer, may likewise demur to the indictment or answer by the following pleas, viz.: By a plea to the jurisdiction; by a plea in abatement to the indictment for some defect contained in it, or by a plea in bar. Or he may move to quash the indictment, or to postpone the trial of it, or may proceed to a trial before a petit jury. These various methods of proceeding upon the part of the prisoner will be taken up and separately considered.

§ 28. PERSONS IMPRISONED ON CONVICTION MAY BE ARRAIGNED AND TRIED FOR AN OFFENCE COMMITTED IN PRISON.

The court in which any indictment is pending against any person imprisoned on conviction of a crime in any county jail or State prison, for an offence committed during such imprisonment is authorized to issue a writ of habeas corpus for the purpose of bringing the individual so indicted before the court for arraignment or trial on such indictment.³

So, also, the court in which any indictment is pending for a felony against any person, imprisoned on conviction of a crime in any county jail or State prison, is authorized to issue a habeas corpus for the purpose of bringing the individual so indicted before such court for arraignment or trial on such indictment.⁴

¹ 2 R. S., 730, § 74.

² *Peo. v. Frost*, 5 Park., 52.

³ R. S., 5th ed., vol. 3, p. 1101, § 180. ⁴ *Id.*, 181.

§ 29. DEFENDANT ENTITLED TO COPY OF THE INDICTMENT.

At common law the defendant was not, in cases of treason or felony, entitled to a copy of the indictment.¹ Our Legislature have done away with this harsh rule by the following enactment:

Every person indicted for any offence, who shall have been arrested upon process issued upon such indictment, or who shall have duly entered into recognizance to appear and answer to such indictment, shall, on demand and on paying the fees allowed by law therefor, be entitled to a copy of the indictment, and of all endorsements thereon.²

A counsel has no right to demand a copy of the indictment of the district attorney. The clerk of the court will furnish it, on payment of fees.³

§ 30. INDICTMENTS, WHEN AND HOW QUASHED.

In all cases where an indictment is so defective that any judgment to be given upon it against the defendant would be erroneous, the court, in its discretion, may quash it.⁴

The application to quash the indictment may be made to the court either by the prosecutor or the defendant, or any one as *amicus curiæ* may suggest the error to the court, in order that it may exercise its discretion.⁵

It is provided by statute that if there be at any time pending against the same defendant two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed.⁶

The mere finding of a second indictment is not *per se* a supersedeas to the first indictment. A motion to quash must be made, and made, too, before the trial on the first indictment has commenced; at all events, before the cause is submitted to the jury; and ordinarily the motion to quash must be made previous to plea pleaded or any evidence given in the case.⁷

¹ 2 Hale, 236; 2 Hawk., ch. 29, § 13; 4 T. R., 692.

² 2 R. S., 728, § 55.

³ *Peo. v. Warner*, 1 Whee. Cr. Cas., 140.

⁴ 2 Hawk., ch. 25, § 146; *Peo. v. Eckford*, 7 Cow., 535.

⁵ Arch. Cr. Pr., vol. 1, § 102; Comb., 13.

⁶ 2 R. S., 726, § 42.

⁷ *Peo. v. Barron*, 20 Wend., 108. See 14 Wend., 9.

After a second indictment for the same matter charged in the first indictment, the defendant may waive his right to have the first indictment quashed by pleading guilty under it.¹

A motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception, as the motion will be granted where the insufficiency is clear.²

Courts will not entertain a motion to quash the indictment or erase it from the docket except for defects appearing upon the face of the proceedings.³

Such a motion should not be allowed to prevail in a doubtful case, but only where the insufficiency of the indictment is so palpable as clearly to satisfy the presiding judge that a verdict thereon would not authorize a judgment against the defendant. It is due to the State and to the rights of the citizen, to have the facts inquired into by a jury, and if the facts charged be affirmed by their verdict, the defendant can have the same advantage by legal points upon a motion in arrest as upon a motion to quash.

And the defect in general must be very gross and apparent to induce the court to dismiss the indictment in this summary way instead of leaving the party to the more usual remedies of demurring or moving in arrest of judgment.⁴

When the court in which the indictment was found, had jurisdiction, the indictment will be quashed.⁵ So, also, when the indictment charged an offence in August in the county of W and the law creating the county of W did not pass until November following, the indictment was quashed.⁷

Where the offences are public in their consequences, and seriously affecting the rights and interests of large classes of the community, the courts have refused to quash the indictment although in some cases it was said to be defective.

Thus the court refused to quash an indictment against a n

¹ *Peo. v. Barry*, 4 Park., 657; 10 Abb., 225.

² *Com. v. Eastman*, 1 Cush., 189; Vol. 1, Arch. Cr. Pr., § 102; *Peo. v. J. Ford*, 7 Cow., 535.

³ *Wickwire v. The State*, 19 Conn., 477; 1 Pa., State R., 105.

⁴ *Com. v. Eastman*, 1 Cush., 189; 8 Halst., 299; 4 Yeates, 69; *State v. Sm. 1 Murphy*, 213.

⁵ 2 Hawk. C., 25, § 146, notes; Cro. Car., 147; Fost., 104; 1 Blac. Rep., 1 Dougl., 240, 241.

⁶ 13 Smed. & Marsh, 189.

⁷ *State v. Jones*, 3 Halst., 307.

ber of persons for breaking and entering a lead mine, though it was defective, because there were large numbers of persons met together and the judges were trying others in the same county for similar offences.¹ So, also, the court will refuse to quash an indictment for a nuisance without a certificate that it is removed.² So, also, they have refused to quash an indictment against a pariah for not repairing a highway on an affidavit that the way was not in repair.³ So, also, have they refused to quash an indictment against overseers for not paying money over to their successors, for it was said this was a growing evil, and affecting the interests of the community;⁴ other cases are also cited.

Where offences, though private in their nature, are public in their consequences, in which the courts have refused to quash as indictments for forcible or fraudulent entries,⁵ for disturbances in church,⁶ or against a bankrupt for embezzling his effects,⁷ or for enticing away a servant.⁸

In a late case in this State, the general rule was laid down as follows: The court will not ordinarily quash an indictment after the defendants have been arraigned and pleaded not guilty. In cases of indictments which charge the higher crimes or other offences which affect the public at large as perjury, forgery, &c., the courts uniformly refuse to quash, except where the objection could not be obviated or the error corrected by a new indictment. The court is in no case bound to quash an indictment *ex debito justitiæ*, but may oblige the defendant to plead or demur.⁹

It is provided by statute that no indictment shall be deemed invalid.

1. By reason of having omitted the addition of the defendant's title, occupation, estate or degree, or by reason of the mis-statement of any such matter, or of the town or county of his residence, where the defendant shall not be misled or prejudiced by such statement; or,

¹ 1 Wils., 325; Com. Dig. Indict., 1 H.; Bac. Abr. Indict. K.

² 4 Burr., 2116; 1 Salk., 372; Cro. Car. 584; 2 Ld. Raym., 1164; Andr., 139, 220; 1 Vent., 370; Bac. Abr. Indict. K.; 1 Barnard K. B., 45.

³ 2 Chit. R., 216.

⁴ 2 Stra., 1268; Bac. Abr. Indict. K.; Com. Dig. Indict., H.

⁵ 6 Mod., 96.

⁶ Cro. Car., 584; 1 Sid., 54.

⁷ 1 Leach, 10; 3 J. B. Moore, 656.

⁸ 1 Salk., 372; Com. Dig. Indict., H; see also 6 Mod., 42; 3 Burr, 1841.

⁹ *Peo. v. Walters*, 5 Park., 661. Vide *Peo. v. Strong*, 1 Abb. Pr., N. S., 244.

2. By the omission of the words, "With force and arms," or any words of similar import; or,

3. By reason of omitting to charge any offence to have been committed contrary to any statute, or contrary to several statutes, notwithstanding such offence may have been created, or the punishment thereof, may have been declared by any statute; or,

4. By reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the defendant.¹

§ 31. MOTION TO QUASH BY THE PROSECUTOR.

When the application is made by the prosecutor the court will not quash the indictment as a matter of course, unless it appear to be clearly insufficient;² nor even then, after the defendant has pleaded, unless another good indictment has been found against him;³ nor where he has been put to extra expense unless the costs are first paid him.⁴ But where the indictment is insufficient, and the defendant is not put to inconvenience, the court will quash it upon the motion of prosecutor without the consent of the defendant.⁵

The application, on the part of prosecutor, may be made at any time before the indictment has been tried.⁶

It is a good ground for granting the motion to quash, that the facts stated in the indictment did not amount to an offence punishable by law.⁷

Under the English practice it is said that, where the prosecution is by the attorney general, an application to quash the indictment is never made, because he may enter a *nolle prosequi*, which will have the same effect;⁸ and; as our district attorneys have the same power, the entry of a *nolle prosequi* is generally resorted to by the prosecution here instead of a motion to quash; and in England, before an application upon the part of the pros-

¹ 2 R. S., 728, § 54.

² Dougl., 240; Com. Dig. Indict., H.

³ 1 Leach, 11; 6 Mod., 262; 2 East. R., 226.

⁴ 3 Burr, 1469; 2 Stra., 946; Stark, 282; Com. Dig. Indict., H; Bac. Abr. Indict., K.

⁵ 3 Burr, 1468; 1 Blac. Rep., 460; Com. Dig. Indict., H; Bac. Abr. Indict., K; 1 Arch. Cr. Pr., § 102, notes.

⁶ 1 Burr, 651; Mott Dig., 284.

⁷ R. v. Philpot, 1 C. & K., 47 E. C. L., 112; 1 Burr, 516; Andr., 230.

⁸ R. v. Stratton, 1 Doug., 239, 240; R. v. Bumby, 48 E. C. L. R., 348.

ecution to quash is granted, a new bill for the same offence must have been preferred against the defendant and found.¹

§ 32. MOTION TO QUASH BY THE DEFENDANT.

When the motion is made on the part of the defendant, the rules by which the court are guided are more strict, and their objections are more numerous, because, if the indictment is quashed the recognizance will become ineffectual;² and courts usually refuse to quash on the application of the defendant, when the indictment is for a serious offence, unless upon the clearest and plainest ground, but will drive the party to a demurrer or motion in arrest of judgment or writ of error.³

It is therefore said to be a general rule that no indictments which charge the higher offences, as treason or felony, or those crimes which immediately affect the public at large, as perjury, forgery, extortion, conspiracies, subornation, keeping disorderly houses, or offences affecting highways or not executing legal process, will be thus summarily set aside.⁴

The application, if made by the defendant, should be before plea pleaded.⁵ Thus, after the defendant has plead not guilty, no motion will lie to quash the indictment.⁶ And the court will overrule a motion to quash after a *nolle prosequi* has been entered.⁷

So, also, if the defendant did not duly appear, or has forfeited his recognizance, his application to quash the indictment will be ineffectual.⁸

The quashing an indictment as to one of several defendants, has the effect of quashing it as to all.⁹

¹ R. v. Wynn, 2 East., 226.

² 2 Sess. Cas., 1.

³ Cald., 432-554; Nolan P. S., 261; 1 Arch. Cr. Pr., § 102, note; Com. Dig. Indict. H.; R. v. Johnson, 1 Wils., 325; 1 Salk., 372; R. v. Thomas, 3 D. & R., 621.

⁴ Arch. Cr. Pr., vol. 1, § 102, note; 1 Salk., 372; Com. Dig. Indict. H.; 5 Mod., 13; 2 Sess. Cas., 1-2-4-8; 1 Id., 337-339; 2 Stra., 1210; 2 Hawk., ch. 25, § 146; Burns, J., Perjury, III; Williams, J., Perjury, II; Bill v. Com., 8 Grat., 600.

⁵ Post., 231; Holt, 684; 4 St. Tr., 677.

⁶ Peo. v. Monroe, 20 Wend., 108; 7 Blackf., 324-186; 3 Shepley, 104; 13 Sme. & Marsh, 468.

⁷ U. S. v. Hill, 1 Brook, 156.

⁸ 1 Salk., 380; 1 Barnard, K. B., 44.

⁹ State v. Smith; Peo. v. Eckhart, 7 Cow., 535; 1 Murphy, 213. *Contra*, Coats v. Peo., 5 Park., 662.

After the indictment against the defendant has been quashed, a new and more regular one may be preferred against him. He can gain, therefore, very little advantage, except delay, by such an application, and therefore usually reserves his objection until after the verdict, when, if the indictment be found to be insufficient, the court are bound *ex debito justitiæ* to arrest the judgment.¹

CHITTY states the rule to be that if the application is made on behalf of the defendant, the court will not grant it unless the defect is very clear and obvious, but will leave him to take objection in some other form.²

§ 33. NOLLE PROSEQUI.

A *nolle prosequi* is defined as "A proceeding on an indictment by which the prosecuting officer agrees to prosecute no further, either as to the whole of the indictment, or as to some particular part of it."³

It is provided by statute that it shall not be lawful for any district attorney to enter a *nolle prosequi* upon any indictment, or in any other way to discontinue or abandon the same without the leave of the court having jurisdiction to try the offence charged entered in the minutes.⁴

The court has no power to order the entry of a *nolle prosequi* upon an indictment. The power at common law could only be exercised by the attorney general, and there is no statute in this State depriving him of it; but a district attorney cannot enter a *nolle prosequi* without leave from the proper court.⁵

A *nolle prosequi* in criminal proceedings does not amount to an acquittal of the defendant; but he may again be prosecuted for the same offence, or fresh process may be issued to try him on the same indictment, at the discretion of the prosecuting officer.⁶

The defendant, however, when a *nolle prosequi* is entered, need not enter into recognizance for his appearance at any other time.⁷

¹ 2 Burr., 1127.

² 1 Chit. Cr. L., 299.

³ Burril's Law Dict., tit. *nolle prosequi*.

⁴ 2 R. S., 728, § 56.

⁵ *Peo. v. McLeod*, 1 Hill, 377; see 25 Wend., 572; 1 Chit. Cr. L., 478; 1 *Ld Raymond*, 721; 2 Mass. R., 414.

⁶ *State v. Thornton*, 13 Iredell, 256; *Com. v. Wheeler*, 2 Mass., 172.

⁷ *Idem*; 13 Iredell, 256.

As the effect of a *nolle prosequi* is to put the defendant without day upon that indictment, he becomes, while he is so, amenable on another indictment, in any court having jurisdiction of the offence.¹

The defendant may be found guilty on one of several counts, and a *nolle prosequi* be entered as to the rest.²

A *nolle prosequi* may also be entered as to one of several defendants at any time before the trial.³

Where the defendant is charged with receiving knowingly stolen goods, and in the same indictment it is alleged that he had before been convicted of the like offence, and the jury brought in a general verdict on such indictment, it was held that a *nolle prosequi* as to the aggravation laid by the allegation, that there had been a former conviction for a like offence might be entered.⁴

A *nolle prosequi* cannot be entered to part of a single count in an indictment, but it may be as to the whole of the indictment, or to any one or more of several counts in it, and a court of sessions has no power to direct a *nolle prosequi* to be entered on an indictment pending therein for an offence not triable in that court.⁵

§ 34. OF PLEAS BY THE PRISONER.

The answer which the defendant makes to the indictment is generally known by the name of his plea. The pleas of guilty and not guilty are delivered orally in court by the prisoner, and entered by the clerk upon its minutes. Special pleas and pleas in abatement require legal skill in framing them, so as to meet the exigencies of the case, and are written out by the counsel for the prisoner;⁶ although they may be, any of them, pleaded *ore tenus*.

It is provided by statute that no plea in abatement, or other dilatory plea to an indictment, shall be received by the court unless the party offering such plea shall prove the truth thereof by affidavit or by some other evidence.⁷

The statute further provides that, where any matter shall be

¹ State v. McNeil, 3 Hawk. S., 183; State v. Haskett, Riley 97.

² Com. v. Stedman, 12 Metc., 444.

³ 11 East. R., 307.

⁴ Com. v. Briggs, 7 Pick., 177.

⁵ Peo. v. Porter, 4 Park., 524.

⁶ Com. v. Merrill, 8 Allen, 545.

⁷ 2 R. S., 731, § 75.

pleaded to an indictment as having occurred in any other county than that in which such indictment was found, it shall be tried in the same manner as if had been alleged to have occurred in the county where such plea is tendered.¹

The pleas which most generally occur in ordinary practice, are the general issue of not guilty, and the special pleas of *autrefois acquit*, *autrefois convict* and pardon; although pleas in abatement are quite frequently to be met with.

§ 35. THE GENERAL ISSUE.

By the general plea that he is not guilty of the treason or felony alleged against him, the defendant denies the truth of the whole charge, and he may give his special defence in evidence though the matter of fact be proved against him.²

In ordinary cases the defendant proceeds to trial upon the merits of this plea.

Under this plea, upon the defendant's giving special matter of excuse or justification in evidence, the jury are as much bound to take notice of it as if it had been specially submitted to their consideration by a special plea.³

Thus if a person indicted for the unlicensed sale of intoxicating liquors wishes to admit the selling, and rely upon a license for his defence, he should not plead the matter specially in this way; but his special defence is to be made on the general plea of not guilty.⁴

By our statute if the defendant refuse to plead or answer, and in all cases where he does not confess the indictment to be true, a plea of not guilty shall be entered by the court, and the same proceedings in all respects shall be had as if he had pleaded not guilty to such indictment.⁵

Under a plea of not guilty the defendant cannot avail himself of the fact that he has been indicted by the wrong name,⁶ nor that he has had a former trial and sentence;⁷ and he can only give in evidence whatever negatives the allegations in the indict-

¹ 2 R. S., 731, § 76.

² 1 Stark., Crim. Pl., 2d ed., 338, 339.

³ 1 Stark., Cr. Pl., 2d ed., 339; *Rex v. Banks*, 1 Esp., 144.

⁴ 1 Bish. Cr. Pro., 466; *Peters v. State*, 3 Greene, Iowa, 74.

⁵ 2 R. S., 730, § 74; vide title, "Of Arraignments," ante page 263.

⁶ *Peo. v. Smith*, 1 Park., 329.

⁷ *Peo. v. Benjamin*, 2 Park., 201.

ment or complaint, and matters of excuse or justification, for where after pleading not guilty, anything occurs available as a defence, the defendant can only avail himself of it by a subsequent plea.¹

Where a defendant had been duly arraigned, and by acts, if not by words, had demanded a trial, and had procured the cause to be set down for trial, and had challenged jurors, produced witnesses, and examined and cross-examined witnesses on both sides, and had summed up the case to the jury, after a verdict of guilty, a motion in arrest of judgment on the ground that a formal plea of not guilty was put in, was denied.²

After a defendant has pleaded not guilty to an indictment, and the cause has been partially tried, it is too late for him to object to the mode in which the grand jury which indicted him was organized.³

§ 36. THE PLEA TO THE JURISDICTION.

By this plea the defendant denies wholly the right of the court to try him. After this plea has been made and overruled by the court, the judgment should in all cases be to answer over to the charge in the indictment.⁴

If the offence were committed out of the jurisdiction of the court, he may take advantage of it under the general issue;⁵ or if the objection appear upon the face of the record, he may demur to it, or move in arrest of judgment, or bring writ of error.⁶

§ 37. OF THE DEMURRER TO THE INDICTMENT.

By a demurrer, the defendant refers it to the court to pronounce whether, admitting the matters of fact alleged against him to be true, they do in point of law constitute him guilty of an offence sufficiently charged against him.⁷

Formerly a demurrer to the indictment was unusual, because the defendant might have the same advantage of objecting by

¹ *Peo. v. Benjamin*, 2 Park., 201.

² *Peo. v. Frost*, 5 Park., 53.

³ *Peo. v. Griffin*, 2 Barb., 427.

⁴ *Rex v. Hollis*, 1 Trem. P. C., 302.

⁵ *East.*, 583.

⁶ *Russ. & Ry. C. C.*, 158.

⁷ *Bish. Cr. Pro.*, 419.

motion in arrest of judgment or writ of error. But by an English statute certain defects in indictments were cured by verdict; hence they therefore could only be taken advantage of by demurrer.¹

The term demurrer signifies that the party will go no further, because the indictment or proceedings are defective in substance or informal in substance.²

A demurrer in criminal cases has the effect of opening the whole record to the court, and therefore, upon arguing it, the defendant may take objections as well to the jurisdiction of the court, where the indictment was found as to the subject matter of the indictment itself.³

(a) In felonies not capital, it seems to be doubtful whether the judgment is final or merely a judgment of *respondeas ouster*. In one case of a felony not capital, upon the defendant's counsel being about to demur, FINDAL, C. J., cautioned him, saying that he might be bound by his demurrer, and not allowed to plead over. He did not actually deliver an opinion upon the point, but expressed great doubt upon it, and the prisoner's counsel thereupon declined to demur, and the prisoner pleaded not guilty.⁴ HAWKINS says that in criminal cases not capital, if the defendant demur to the indictment, the court will not give judgment against him to answer over, but final judgment.⁵

BLACKSTONE says it appears the most reasonable that the defendant in such cases shall be directed and required to plead the general issue after a demurrer determined against him, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no, and upon the fact thus shown it appears to be felony, the court will not record the confession, but admit him afterwards to plead not guilty.⁶

In a late English case it was held in felonies, that on a general demurrer, judgment for the crown was final, inasmuch as the defendant thereby confessed all the material facts charged

¹ Stat. 7, G. IV, ch. 64, § 20; R. v. Fenwick, 2 Car. & K., 915; Arch. Cr. Pr., vol. 1, § 115.

² 4 Blac. Com., 333.

³ R. v. Fearnley, 1 T. R., 316.

⁴ 1 Car. & K., 501, vol. 1; Arch. Cr. Pl., § 115.

⁵ 2 Hawk., ch. 31, § 7, 257-334.

⁶ 4 Bla. Com., 334.

against him in the indictment; but in cases of demurrer of a special nature, usually called demurrer in abatement, the court thought it might be otherwise, and the judges intimated that the various *dicta* which appeared in the books in opposition to the above ruling were probably to be accounted for by this distinction not having been sufficiently attended to.¹

(b) In capital cases the defendant is not concluded by the judgment on the demurrer, but if the judgment be against him, he may still plead not guilty, and where a defendant in such case demurs, it is usual for him at the same time to plead over to the felony.²

(c) In misdemeanors the judgment upon demurrer is final, and not merely that the defendant shall answer over;³ but by the permission of the court he may plead over.⁴

In the United States, however, the English rule seems to have been disregarded in such cases where there is, on the face of the pleading, no admission of criminality on the part of the defendant, and to give judgment *quod respondeat ouster*.⁵

(d) The demurrer may be pleaded *ore tenus* on whichever side the objection arises, and in capital cases and by some authorities in felonies, the defendant may either demur and at the same time plead over to the felony, or may take the latter course after the demurrer is found against him.⁶

Demurrers are seldom used, since the same advantages may be taken upon a plea of not guilty.⁷

The same rule of pleading applies to criminal and civil cases, that the party committing the first fault shall have judgment rendered against him. Thus where the People demurred to the defendant's plea of a former acquittal, the indictment having proved bad, it was held that irrespective of the question of the sufficiency of the plea, the defendant was entitled to judgment.⁸

¹ R. v. Faderman, 1 Den. C. C., 565; Vide Roscoe's Cr. Ev.; R. v. Duffy, 4 Cox C. C., 24; 1 Den. C. C., 293, et seq.; 7 Cox C. C., 85, 86.

² Vol. 1, Arch. Cr. Pl., § 115; R. v. Phelps, Car. & M., 180; Idem., 299.

³ R. v. Gibson, 8 East., 112.

⁴ R. v. Binghamton R. R., 3 Q. B., 224; 43 E. C. L. R.

⁵ Arch. Cr. Pr., vol. 1, § 115, note; Com. v. Goddard, 13 Mass., 456; 8 Watts & Serg., 77; 3 Pa. Rep., 262.

⁶ 1 Chit. Cr. Law, 440; Fost., 105; 4 Blac. Com., 334; 2 Hale, 257; 8 East., 112.

⁷ 4 Blac. Com., 334.

⁸ Peo. v. Krummer, 4 Park. 217; Vide Id., 386.

§ 38. DECLINATORY PLEAS.

These pleas are unknown to the law of our State. They were of two kinds: the privilege of sanctuary, which was abolished in the reign of James the First,¹ and second, the plea of benefit of clergy.

§ 39. OF PLEAS IN BAR OF THE INDICTMENT.

Of these are the pleas of *autrefois acquit*, *autrefois convict* and *autrefois attaint*. These pleas are commonly known under the name of the plea of former jeopardy. They show, by matter extrinsic of the record, that the indictment should not be maintained.

The prisoner, in taking advantage of a former jeopardy, brings the fact to the attention of the court by two pleas in bar known to the common law; the one of which is produced when the jeopardy has resulted in a conviction, and is called the plea of *autrefois convict*; the other of which is brought forward when the jeopardy has resulted in an acquittal, and is called the plea of *autrefois acquit*.²

That the defendant was formerly indicted and acquitted is a good plea in bar to a subsequent indictment for the same offence,³ for the law will not suffer a man to be twice put in jeopardy for the same offence.⁴

This principle is sanctioned and enforced in different forms of words in most of the constitutions of the several States and in the constitution of the United States.⁵

The maxim that a man ought not to be brought twice into danger, Justice STORY remarks, is embodied in the very elements of the common law, and has been uniformly construed to present an insurmountable barrier to a second prosecution where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment.⁶

Even an erroneous acquittal is conclusive until the judgment is reversed, so that if a judge direct the jury to acquit the prisoner

¹ 21 Jac., 1, ch. 28.

² Bish. Cr. Pro. § 72.

³ 2 Hale, 241-242; 2 Hawk., P. C., ch. 3, § 1.

⁴ Id.; Hale, 241, 242; 2 Hawk. P. C., ch. 35, § 1.

⁵ 5th art. of amendts., Const. U. S.; Const. N. Y., art. 1, § 6; notes to Arch. Cr. P., vol. 1, § 111.

⁶ U. S. v. Gilbert, 2 Sumner, 42.

on any ground, however fallacious, he is entitled to the benefit of the verdict.¹

If a man be acquitted on an indictment for murder, he cannot afterwards be indicted for manslaughter of the same person, for he might have been convicted of manslaughter on the former indictment.²

The issue joined upon a special plea of a former trial, can only be tried by a jury: the consent of a defendant cannot confer jurisdiction upon the court to try the issue without a jury.³

The form of the pleas of both *autrefois convict* and *autrefois acquit* given in the appendix, will afford much instruction concerning the practice in interposing a defence of this description.

If judgment be given in favor of the defendant, it is that "he go thereof without day," and if the issue be found against the defendant, it is that he answer over to the felony, if such be the nature of the indictment, or in the case of a misdemeanor that he receive judgment for the offence.⁴

And in cases of felony, where he pleads over at the same time with the plea of *autrefois acquit*, the jury are charged again to inquire of the second issue.⁵

It seems to be doubted, whether in cases of misdemeanor, the defendant might plead over by leave of the court.⁶

In cases where a plea of *autrefois acquit* is interposed, if the indictment be for a felony, the defendant should also plead over to the felony.⁷

But if the defendant plead *autrefois acquit* without pleading over to the felony, after his special plea is found against him, he may still plead over to the felony.⁸

Where the plea of not guilty is tendered at the same time with that of a previous acquittal, the defendant cannot have both issues

¹ *State v. Norvell*, 2 Gerger, 24.

² 2 Hale, 246.

³ *Grant v. Peo.*, 4 Park., 527.

⁴ 2 Gob. Cr. L., 336; *Peo. v. Saunders*, 4 Park., 196; 1 Arch. Cr. Pr., 113; 2 Hale, 253-257; 2 Hawk. ch. 36; *R. v. Scott*, 1 Leach 401; *R. v. Bowman*, 6 C. and P., 337; *R. v. Goddard*, 2 Ld. Raym., 920. But see 13 Mass., 455; 8 Watts & Serg., 77.

⁵ 2 Leach, 708; Id. 448.

⁶ *R. v. Straham*, 7 Cox C. C., 85, 86.

⁷ Arch. Cr. Pl. and Ev., note.

⁸ 2 Hawk. P. C., ch. 23, § 128; *Rex v. Sheen*, 2 Car. and P., 634; 13 Mass., 455.

submitted to the jury at once, but the court will order the special plea to be passed on first.¹

A former acquittal or conviction must be availed of by this plea, it cannot be availed of on motion in arrest of judgment.²

The plea of *autrefois acquit* is of a mixed nature, and consists partly of matter of record and partly of matter of fact. The matter of record, is the former indictment and acquittal; the matter of fact, is the averment of the identity of the offence, and of the person as having been formerly indicted.³

To sustain the plea of *autrefois convict*, no judgment sentencing the prisoner need have been pronounced on the verdict.⁴ But to sustain the plea of *autrefois acquit*, it is necessary that the defendant should produce a record of acquittal.⁵ And the plea should set out the record of the former conviction or acquittal, and allege that the two offences are the same, and that the defendant in the former suit is the same person who is the defendant in the latter suit.⁶

As to the identity of the offence, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason as it is repugnant to the rules of law, to say that the offences are so far the same that an acquittal of the one will be a bar to the prosecution of the other.⁷

But on the other hand it is clear that if the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal, with proper averments, for it would be absurd to suppose that by varying the day, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial.⁸

If one person was indicted singly, he may plead that he was

¹ *Rex v. Roche*, 1 Leach, 134; 8 Allen, 545.

² *State v. Barnes*, 32 Maine, 530.

³ 4 Blac. Com., 335.

⁴ *State v. Elden*, 41 Maine, 165.

⁵ *Bailey v. The State*, 26 Ga., 579.

⁶ *Rex v. Wildey*, 1 M. & S., 183; 5 Rand., 669; 2 East. P. C., 519; 2 Leach, 4th ed., 708; 3 B. & C., 502.

⁷ 2 Leach, 717; 12 Pick., 505.

⁸ Arch. Cr. Pr., vol. 1, § 112, note; 3 Inst., 318; Hawk. B. 2, ch. 35, § 3; 1 Leach, 448; 2 Hale, 224-247; 13 Mass., 245.

before indicted jointly with other persons, and on such indictment convicted or acquitted.¹

On a plea of *autrefois acquit*, a jury are sworn instantly to try the cause.² The proof of the issue lies upon the defendant.³ To prove it, he has first merely to prove the record, and secondly to prove the averment of indentity contained in his plea.⁴

Where the second indictment is preferred at the same term, the original indictment and minutes of the verdict are receivable in evidence in support of the plea of *autrefois acquit*, without a record being drawn up.⁵ But where the previous acquittal was at a previous term in the same jurisdiction, or in a different jurisdiction, it can only be proved by the record.⁶

When the only issue is the identity of the offences, a technical difference between the description of the property in the first indictment and the second will be disregarded.⁷

It was formerly said that the former indictment, however, must appear to have been a good and valid indictment for the offence, and which might be supported by the same evidence as would support the present one.⁸

Thus an acquittal upon an invalid and insufficient indictment was no bar to another indictment for the same offence, as if the offence was alleged to have been committed in another district than the one in which the bill was found, or if an impossible date was assigned to the commission of the offence, as a day posterior to the finding of the indictment.⁹

But it is provided by statute in this State that when a defendant shall have been acquitted of a criminal charge upon trial on the ground of a variance between the indictment and the proof, or upon any exception to the form or substance of the indictment, he may be tried and convicted upon a subsequent indictment for

¹ *Rex v. Dunn*, 1 Moody, 424.

² *Leach*, 541.

³ *Arch.*, 90.

⁴ *2 Russ.*, 721, n.

⁵ *Rex v. Parry*, 7 C. & P., 836.

⁶ *R. v. Bowman, Id.*, 101-337.

⁷ *Peo. v. McGowan*, 17 Wend., 386.

⁸ *2 Hawk.*, ch. 35, § 8; *R. v. Vandercombe*, 2 *Leach*, 708; *Vaux's Case*, 3 *Co.*, 45; *Wigg's Case*, 4 *Co.*, 46, b.

⁹ 1 *Rice*, 1; 13 *Mass.*, 245; 9 *Yerger*, 357; *Thatch.*, C. C., 202; 3 *Scammon*, 363; 1 *Rich.*, 219; 6 *Serg. & R.*, 577; 3 *Rowle*, 498; 2 *Pick.*, 521; 1 *John. Rep.*, 66; 12 *Pick.*, 496.

the same offence, and that where a defendant shall have been acquitted upon trial on the merits and facts, and not upon any ground last above stated, he may plead such acquittal in bar of any subsequent accusation for the same offence, notwithstanding any defect in form or substance in the indictment upon which such acquittal was had.¹

The statute further provides, that when a defendant shall be acquitted or convicted upon any indictment for an offence consisting of different degrees, as prescribed by the statute, he shall not thereafter be tried or convicted for a different degree of the same offence; nor shall he be tried or convicted for any attempt to commit the offence charged in the indictment, or to commit any degree of such offence.²

To subject a prisoner to a second trial, where a former conviction has been reversed and a new trial ordered by a court on review on the application of the prisoner, is not a violation of the constitutional provision which declares that no person shall be subject to be twice put in jeopardy for the same offence.³

It is said to be clear, however, that if a man be indicted as accessory after the fact and acquitted he may be afterwards tried as a principal, for proof of one will not at all support the other.

A trial and conviction before a court of special sessions for an assault and battery are no bar to a subsequent indictment for manslaughter, where the person assaulted dies subsequently of the wounds caused by the blows for the inflicting which the complaint for assault and battery was made; a former trial is no bar unless the first indictment was such as the accused might have been convicted upon by proof of the facts set forth in the second indictment. To constitute a bar, the offence charged in both indictments must be identically the same in law as well as in fact.⁴

And in illustration of the doctrine that, in considering the identity of the offence, it must appear by the plea that the offence charged in both cases was the same in law and fact, the following case is cited: where to an indictment for rape, the prisoner pleads

¹ 2 R. S., 762, §§ 34, 35.

² 2 R. S., 702, § 38.

³ *Peo. v. Ruloff*, 5 Park., 77.

⁴ 1 Hale, 625; 2 Id., 244; Hawk., bk. 1, ch. 35, § 11.

⁵ *Burns & ano. v. The Peo.*, 1 Park., Cr. R., 182; vide 1 Park., Cr. R., 445 Id., 338.

that he had been convicted before a justice of the peace, on the oath of the prosecutrix, of an assault and battery upon her, and fined twenty dollars, which fine was paid by him, and that the assault and battery of which he was so convicted, was the same assaulting, beating, ravishing and carnally knowing of the said prosecutrix charged in the indictment for rape. On demurrer to such plea, it was adjudged bad on the ground that the facts set forth constituted no defence to the indictment for rape, and that an acquittal upon an indictment for felony constitutes no bar to an indictment for a misdemeanor; and that an acquittal for a misdemeanor, is no bar to an indictment for a felony; that to make the plea of *autrefois convict* or *autrefois acquit* a bar, it is necessary that the crime charged in both cases be precisely the same. The above case does not come within the provision of the Revised Statutes, which makes an acquittal or conviction on a former trial for an offence, a bar to an indictment for such offence in any other degree or for an attempt to commit such offence.¹

The entry of a *nolle prosequi* is not an acquittal, and cannot be pleaded in bar to a subsequent indictment for the same offence.²

The plea of *autrefois convict* depends, like the one we have just considered, on the principle that no man shall be put more than once in peril for the same offence.³

The form, requisites and consequences of this plea are very nearly the same as in a plea of former acquittal. Like that plea it must set forth the former record, and plead over to the felony.⁴ And as in that the identity must be shown by averments, both of the offence and of the person, so the same forms are here requisite.⁵ Also, like that plea, in order to constitute it an available defence in bar of another prosecution, the former conviction must have been had before a tribunal having competent jurisdiction.⁶

The statute in relation to duelling and challenges to fight in this State, provides that every offender against the provisions of that statute may plead a former conviction or acquittal for the

¹ *Peo. v. Saunders*, 4 Park., 196.

² *Mass.*, 172; 5 *Rand.*, 669.

³ Vol. 1, *Arch. Cr. Pl.*, § 114, note; *State v. Cooper*, 1 *Green*.

⁴ 2 *Hale*, 255-392, *Burn, J.*, *Indict*.

⁵ *Id.*

⁶ 10 *Humph.*, 431; 13 *Mass.*, 455; 1 *Engl.*, 187; 2 *Ark.*, 229; *R. v. Welsh*, *Ry. & M.*, 175; 12 *Metc.*, 387; 4 *Blackf.*, 156.

same offence in another State or country, and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offence.¹

The question whether a former trial and conviction for abduction are a bar to a subsequent indictment found for murder alleged to have been previously committed, cannot be raised and made a ground for discharge on habeas corpus. Such defence can only be made available, if at all, on the trial of the indictment for murder.²

Among the decisions made in this State upon this subject, the following may be mentioned:

Where, on a trial for a felony, after the public prosecutor has entered upon his case and given evidence to the jury, he finds himself unprepared with the proper evidence to convict, and obtained leave of the court to withdraw a juror and thus arrest the trial, such withdrawal not being the result of improper practice on the part of the defendant, or any one acting with or for him, or of any overruling inevitable necessity, the defendant can not again be put on trial for the same offence, but the objection to a second trial in such a case does not rest upon the constitutional provision that no person shall be subject to be put twice in jeopardy for the same offence. That provision is a protection only where there has been a conviction or acquittal by the verdict of a jury, and judgment has passed thereon, and does not apply to a case where the jury have been discharged without giving any verdict, or where judgment has been arrested. The objection lies back of the Constitution, and rests upon the principles of the common law, which are essential to the protection of the accused, by securing him a speedy and impartial trial and the best means of vindicating his own innocence.³

Where a defendant, by a subsequent deposition, expressly contradicts a former one made by him, and makes apparent his corrupt motive, and negatives the probability of a mistake in the first, a conviction upon an indictment for perjury in either deposition would bar an indictment for perjury in the other.⁴

A conviction for misdemeanor, consisting in the commission of

¹ 2 R. S., 687, § 7.

² *Peo. v. Ruloff*, 3 Park., 126.

³ *Klock v. Peo.*, 2 Park., 676.

⁴ *People v. Burden*, 9 Barb. 467.

certain acts, *e. g.*, administering drugs to procure an abortion, will bar a prosecution for felony based on a charge that such act was performed with an intent which would render it felonious, *e. g.*, with intent to destroy the life of the child.¹

Upon an indictment for rape, a plea which alleges that the charge was brought before a magistrate who decided that there was probable cause for a charge of assault and battery only, and convicted the prisoner of that offence, constitutes no defence.²

After acquittal on an indictment for rape, the prisoners were indicted for assault and battery with intent to commit a rape, and for assault and battery; it was held that the former acquittal was a bar to the first charge in the indictment, but not to the second.³

A trial for robbery involves the question of larceny, and on acquittal is a perfect bar to a prosecution for larceny in respect to the same property.⁴

An acquittal of the defendant, on an indictment for a nuisance caused by a dam erected by him, is no bar to a subsequent indictment for a nuisance arising from the same cause years after.⁵

An acquittal on an indictment for forging indorsements on a note was held a bar to a subsequent indictment for uttering the note, knowing the indorsement to be forged; the evidence of the guilt in the latter case being such as would necessarily have established the guilt in the former case.⁶

But a previous acquittal, on an indictment for forging a certificate of deposit, is no bar to an indictment for attempting to obtain money by means of a forged letter enclosing the certificate to the bank.⁷

An acquittal by a jury, on a charge of having a single counterfeit bill in possession with an intention of passing the same, was held no bar to a prosecution against the prisoner so acquitted; and another, for having a large quantity of counterfeit money in possession.⁸

¹ *Lohman v. Peo.*, 1 N. Y. (1 Com.), 379; 2 Barb., 216.

² *Peo. v. Saunders*, 4 Park., 196.

³ *Sargeant's Case*, 2 City H. Rec., 44.

⁴ *Peo. v. McGowan*, 17 Wend., 386.

⁵ *Peo. v. Townsend*, 3 Hill, 479.

⁶ *Peo. v. Allen*, 1 Park., 445.

⁷ *Peo. v. Ward*, 15 Wend., 231; contra, *Peo. v. Krummer*, 4 Park., 217.

⁸ *Van Houton's Case*, 2 City H. Rec., 73.

An acquittal upon an indictment for stealing the goods of Jenkins, the acquittal being had upon the ground that the goods belonged to Jenkinson, is no bar to a subsequent indictment for stealing the same goods as belonging to Jenkinson.¹

The arresting of judgment after conviction of a felony is no bar to a second indictment for the same offence, though the second indictment be similar to the first.²

In the case of an indictment for compounding an offence, the acquittal of the alleged offender is not a good plea in bar because it is at the best, but *prima facie* evidence of the non-commission of the offence.³

In duelling, a former conviction without the State is by statute made a bar to a prosecution in this State.⁴

The other plea of *autrefois attaint*, although known to the common law, is said to not be available with us.⁵

In cases of seduction under promise of marriage, the subsequent marriage of the parties may be plead in bar of a conviction.⁶

In this State the statute of limitations to be available in a criminal case should be pleaded.⁷

§ 40. OF THE PLEA IN ABATEMENT.

Pleas in abatement are founded either on some defect apparent on the face of the record, or upon some matter of fact extrinsic of the record which render it insufficient.⁸

Any defect which, in any stage of the criminal proceeding will vitiate the indictment, may be taken advantage of by plea in abatement.⁹

If the defendant be indicted by a wrong name, he may plead it in abatement, and if the fact be found for him, the indictment shall be abated.¹⁰ But the omission of the defendant's title, occu-

¹ Hughes' Case, 4 City H. Rec., 132.

² Peo. v. Casboras, 13 John., 351.

³ Peo. v. Buckland, 13 Wend., 592; see 18 John., 352.

⁴ 2 R. S., 687, § 7.

⁵ Bish. Cr. L., I., § 898.

⁶ 2 R. S., 664, § 26; Laws 1848, ch. 111.

⁷ Peo. v. Roe, 5 Park., 231.

⁸ 1 Bish. Cr. Pro., 416.

⁹ 2 Hale P. C., 236.

¹⁰ 2 Hale P. C., 238; 1 Metc., 151; 5 Porter, 236.

pation, estate or degree can no longer be pleaded in abatement in this State.¹

The incompetency of the grand jurors who find a bill, is a matter which may be pleaded in abatement; thus, under a statute requiring that grand jurors should be freeholders, a plea in abatement setting forth that some of the jurors who served on the grand jury were not freeholders, was held good.²

A plea in abatement should set forth the grounds of objection specifically;³ and it is essential that the facts should be stated, out of which the defence arises, or a negative of that state of facts which is to be presumed from the existence of a record.⁴

Pleas in abatement, in criminal as well as in civil cases, must be pleaded at the proper time. By pleading not guilty, the accused waives matter in abatement.⁵

When a plea in abatement is found in favor of the defendant, the judgment in a case of misdemeanor is that he be not compelled to answer the indictment, but depart the court without day.⁶ And in cases of felony, the judgment is that the defendant do answer over.⁷ But if the plea is found against the defendant, the jury, or the court if the case is submitted to the court without a jury, should fix the penalty, and the judgment of the court should be in accordance with the verdict.⁸ On an accusation for a capital crime, however, after the indictment has been abated for a misnomer, the court will not dismiss the prisoner, but cause him to be indicted *de novo* by the the name disclosed in his plea, to which he can make no second objection.⁹

And if the grand jury be not discharged, another bill may be immediately preferred, whatever may be the description of the offence.¹⁰

¹ 2 R. S., 728, § 54.

² *Peo. v. Jewett*, 6 Wend., 386; 3 Wend., 314, contra. See authorities cited in note to § 111, vol. 1, Arch. Cr. Pl., ed. 1860.

³ *Brennan v. The Peo.*, 15 Ill. Rep., 511.

⁴ *State v. Brooks*, 9 Ala., 10; *State v. Newer*, 7 Blackf., 307.

⁵ *McQuillen v. State*, 8 Sme. & Mar., 587.

⁶ 2 Hale, 238; 10 East., 88. Where see form.

⁷ Arch. Cr. Pl.

⁸ *Guess v. State*, 1 Eng.; Ark. R., 147.

⁹ *Cro. Car.* 371; 2 Hale, 176-238; *Hawk. B.*, 2 ch. 34, § 2; 1 Arch. Cr. Pr., III, note.

¹⁰ *Idem*; *Cro. C. C.*, 21; *Dick. Sees.*, 167.

If it be pleaded by one of the several defendants and allowed, it will only quash the indictment as to him, without affecting it as to those who are correctly indicted.¹

This plea should be verified by affidavit or some other evidence.²

A plea in abatement is a dilatory plea, and should be pleaded with exact strictness.³

It is the usual practice where a plea of misnomer is put in, to re-indict the defendant by the new name, without pushing the old bill further.⁴

The prosecutor may, however, if he think fit, deny the plea, or reply that the defendant is known as well by one christian or surname as another.⁵

It is not a good replication that the defendant is the same person mentioned in the indictment.⁶

§ 41. PLEA OF GUILTY.

The effect of this plea is merely to bind the defendant to the fact of his having done what is legally charged against him in the indictment, and if the indictment is insufficient and contains no valid charge of an offence, the plea of guilty, confesses none.⁷

The plea of guilty is a confession of the offence which subjects the defendant to precisely the same punishment as if he were tried and found guilty by verdict. But, as defendants often imagine that by pleading guilty they are likely to receive some favor from the court in the sentence that will be passed upon them, the judge very frequently undeceives them in that respect, and apprizes them that their pleading guilty will make no alteration whatever in their punishment.⁸

The plea of guilty is the highest kind of conviction of which the case admits,⁹ and may be received after the plea of not guilty

¹ Rep. Temp. Hardw., 303; 2 Hale, 177; Bac. Abr., tit.; Indict. G.; 2 Williams, J., Misnomer and Addition; 1 Arch. Cr. Pr., § 111; note.

² 2 R. S., 731, § 75; Ante.

³ O'Connell v. Reg., 11 Cl. & Fin., 159; 9 Jurist, 25.

⁴ Whar. Cr. L., 3d ed., 246; 2 Hale, 176-238; Burn. Indict., 9; Dick. Sess., 167.

⁵ 2 Hale, 237, 238; 2 Leach, 476; Cro. C. C., 21.

⁶ 2 Hale, 238; 2 Leach, 478; 3 Inst., 27; Starkie, 296.

⁷ 1 Bish. Cr. Pro., 464; Fletcher v. State, 7 Eng., 169.

⁸ Arch. Cr. Pr., vol. 1, § 110. ⁹ 2 Hale, 225.

is recorded, whenever the defendant wishes to withdraw his plea of not guilty and confess the accusation.¹

§ 42. -THE PLEA OF NOLO CONTENDERE.

Bishop says the plea of *nolo contendere*, as it is usually called, is not common; but it is sometimes in misdemeanors allowed, partly by way of compromise between the prosecuting officer and the defendant. It differs but slightly in its effect from the plea of not guilty.²

Hawkins states it to be an implied confession, where the defendant in a case not capital doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine.³

Perhaps the only difference between this plea where it is received and the plea of guilty is, that while the latter is a solemn confession which may bind the defendant in other proceedings, the former is held to be a confession only for the purposes of the particular case.⁴

§ 43. OF THE PLEA OF PARDON.

When the prisoner has either personally obtained a pardon for himself or is included in a general act of grace, he should plead that privilege specially, as otherwise the court will not be bound to allow it, and, indeed, has no discretionary power to notice it.⁵

The pardon is only a bar to an indictment for an offence specified in it, and not for any other committed before or after.⁶

If there be any variance between the denomination of the party in the indictment and in the pardon, or in his addition, he may show by proper averments of identity that the same person is intended. So, also, if in an indictment for homicide, the time of the death is stated differently, the variance may be thus explained and rendered harmless. And if these explanatory averments be

¹ 2 Hawk., P. C., ch. 31, § 1; 3 Hill, Rep., 395.

² 1 Bish. Cr. Pro., 469.

³ 2 Hawk. P. C., ch. 31, § 3.

⁴ Com. v. Fulton, 8 Met., 232; Com. v. Tilton, 9 Pick., 206; 1 Bish. Cr. Pro., 469.

⁵ Cro. Car., 32-449; U. S. v. Wilson, 7 Peters, 150.

⁶ R. v. Harrod, 2 Car. & K., 294.

omitted, the court will, in their discretion, defer the proceedings in order to give time for the defendant to perfect his plea, or to obtain a more effectual pardon.¹

In pleading a general act of pardon, if the act contain exceptions of particular persons by name, or of a general description of persons, it is in general necessary for the defendant to show specially that he is not one of the parties named in the statute, as without its benefit in the first case, or included in the prescribed description in the second.²

§ 44. OF REPLICATIONS TO SPECIAL PLEAS AND OF JOINDERS TO DEMURRERS.

The district attorney should traverse the special pleas of the defendant by a replication, and the defendant's demurrer by a joinder thereto, forms of which will be found in the appendix.

§ 45. BAILING THE DEFENDANT AFTER INDICTMENT.

Upon the arrest of the defendant upon the bench warrant, and his presence in court, he may make an application to be let to bail. He may be let to bail from day to day during the session of the court, or he may make an application to postpone or continue the trial of his indictment to the next term of either the court of oyer and terminer, or of the sessions, if the offence be triable in that court, and be let to bail for his appearance at the term of the court to which the indictment is sent for trial. Bail has been defined to be the delivery of a person to his sureties, upon their giving, together with himself, sufficient surety for his appearance at court to answer the charge against him, he being supposed to continue in their friendly custody instead of going to prison.³

A recognizance taken in pursuance of an order of an officer authorized to let to bail, and by an officer having general jurisdiction to let to bail and to take recognizances, though he be not the officer before whom the application to let to bail is pending is valid, especially where the officer acquires jurisdiction of the person of the party by his voluntary appearance and acknow

¹ Hawk., B. 2, ch. 37, § 66; Bac. Abr. Pardon, G. II; 1 Rol. Rep., 368; Bro Abr. *Charter de Pardonne*, 15; Reilw., 58; 1 Dyer, 34 a.

² Oro. Eliz., 125.

³ 4 Blac. Com., ch. 22, § 297.

ledgment, and where the officer before whom the application is pending subsequently adopts the recognizance thus taken, and lets the prisoner to bail of it, and the recognizance itself is filed by him and becomes a record.¹

§ 46. POWER OF OYER AND TERMINER AND COURTS OF SESSIONS TO BAIL PRISONERS.

The courts of oyer and terminer held in any county, have power to let to bail any person committed before indictment found, upon any criminal charge whatever,² and, by virtue of their power to deliver the county jails according to law of all prisoners therein,³ have power to let to bail persons indicted upon any criminal charge whatever.⁴

The court of sessions of any county have power to let to bail persons committed to the prison of such county before indictment found, for any offence triable in such court;⁵ and also to let to bail persons indicted in the said court for any crime or misdemeanor triable therein as provided by law.⁶

It is also further provided by statute that in the cases where by law persons indicted may be let to bail for their appearance at the court having cognizance of the offence, they may be so let to bail by the court having jurisdiction to try the offence charged.⁷

§ 47. BY WHOM BAIL MAY BE TAKEN AFTER THE ADJOURNMENT OF THE COURT.

Although the application to let the defendant to bail may be granted, it sometimes happens that his sureties may not be forthcoming until after the court has adjourned.

There is a provision of the Revised Statutes⁸ which provides that a justice of the Supreme Court shall have power to let to bail in all cases, a judge of the county court, in all cases triable in a court of sessions, and justices of the peace, aldermen of cities,

¹ *Peo. v. Leggett*, 5 Barb., 360.

² 2 R. S., 710, § 32.

³ 2 R. S., 206, § 14, sub. 3.

⁴ *Peo. v. Van Horne*, 8 Barb., 162; *Peo. v. Hyler*, 2 Park., 570.

⁵ 2 R. S., 710, § 33.

⁶ 2 R. S., 209, § 5, sub. 10.

⁷ 2 R. S., 728, § 59.

⁸ 2 R. S., 710, § 31.

and in the city of New York special justices, and assistant justices in all cases of misdemeanor, and in all cases of the felony where the imprisonment in the State's prison cannot exceed five years; but a subsequent section of the statutes,¹ declares that no officers other than those therein named, shall let to bail any person *indicted* for any offence, where the court having jurisdiction to try the offence charged is not in session.

The officers named in the section last above referred to, who have power to bail after indictment found, where the court having jurisdiction to try the offence charged is not in session, are Supreme Court judges, and when the offence charged may be tried in a court of sessions, the judge of the county courts in the county where the indictment was found. But it has, however, been held in a late case, that a county judge may let to bail in all cases that a justice of the Supreme Court can let to bail, whether the prisoner be indicted or not; a county judge having the same power under the judiciary act of 1847, that Supreme Court commissioners formerly had in that respect.²

When a person charged with crime is let to bail by a judge out of court, it is customary for the sureties to appear with such person before the judge, and there execute and acknowledge the recognizance; yet, as the statute only requires that recognizances in criminal proceedings, not taken in open court, "shall be in writing, and subscribed by the parties to be bound thereby," it is only necessary that the criminal should appear before the judge to confer jurisdiction on such judge to let him to bail, and the acknowledgement of the execution of the recognizance by the prisoner's sureties, may, therefore, be taken by a judge in another county.³

A justice of the Supreme Court at chambers, has not power to let to bail a person arrested within the county of such justice's residence, upon a State prison offence, and under a warrant which was issued in another county, and one who is arrested upon a bench warrant duly issued on an indictment in another county, cannot be let to bail in the former county; he must be carried to the county whence the warrant issued.⁴

¹ 2 R. S., 728, §§ 59, 60.

² *Peo. v. Hurlburt*, 44 Barb., 130.

³ *Peo. v. Hurlburt*, 44 Barb., 126.

⁴ *Matter of Gorsline*, 21 How., 85; 10 Abb., 282; *Sichel v. Chapman*, 21 How., 202. Vide 6 Hill, 344.

It is provided by statute that no person committed to jail in the county of Erie, after indictment found against him, shall be admitted to bail without the written consent of the district attorney, except by some court having jurisdiction to try the offence charged in the indictment, or by one of the officers authorized by law to allow writs of certiorari, and make orders for the removal of criminal causes in the said county of Erie.¹

The officers above mentioned are the county judge of Erie county, being of the degree of counsellor at law in the Supreme Court, the justices of the Supreme Court and superior court, and the recorder of the city of Buffalo.²

Under the English practice, the officer who lets the defendant to bail, issues what is called his warrant of deliverance to the sheriff or jailor who has the custody of him. With us it is usually the practice for the officer taking the bail to indorse upon the bench warrant a memorandum signed by such officer, stating that he has let the prisoner to bail, and discharged him from custody upon a proper recognizance being executed. In case, after the adjournment of the court, the prisoner should desire to be let to bail, upon making an application to the proper officer for the purpose, if the application be granted, such officer generally sends a written request to the sheriff or jailor having the custody of the defendant, requesting that he bring the body of the defendant before him for that purpose. If the sheriff or jailor should decline to obey the request, the defendant should then procure a writ of habeas corpus to be brought before the judge for the purpose of being bailed.

§ 48. IN SUCH CASES RECOGNIZANCE TO BE FILED.

Whenever any person indicted for any offence shall be let to bail, the officer taking the recognizance shall immediately file the same with the clerk of the county in which the indictment was found.³

The Laws of 1861, chap. 333, § 2, further declare that every recognizance taken to appear and answer at any court, and the papers upon which such recognizance is founded, shall be filed in the office of the clerk of the court at which the party is

¹ Laws 1846, ch. 142, § 4; 2 R. S., 710, § 38.

² Id., § 1.

³ 2 R. S., 729, § 61.

thereby recognized to appear within ten days after the same is so taken.

Where a prisoner is let to bail out of court, the recognizance taken must be filed as required by the statute before any action can be taken upon it by the court, and no suit can be maintained upon such a recognizance without averring in the complaint and proving on the trial that it had been filed or made a record of the court in which it was returnable.¹

§ 49. OF THE DISCRETIONARY POWER TO BAIL.

The power to bail is incident to the power to hear and determine.²

The object of an arrest and imprisonment before trial and conviction is not the punishment of the delinquent, but to secure his forthcoming to abide his trial; and the probability of flight to evade the punishment must be taken into consideration on an application to admit to bail.³

So, also, should the nature of the crime charged, the kind and degree of punishment affixed to it, and the probabilities of conviction, be taken into account upon determining this question, so that the letting to bail will, in all reasonable probability, secure his forthcoming to abide the event of the trial.⁴

Blackstone says, that wherever bail will answer the same intention as a commitment for safe custody, it ought to be taken, as in most of the inferior crimes; but in felonies and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life, and what satisfaction or indemnity is it to the public to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity.⁵

In cases of felony the defendant cannot demand, as a matter of right, to be released from imprisonment and let to bail.⁶

Upon a question of bail, before indictment on a charge of murder, where the accused, after having been committed by the cor-

¹ *Peo. v. Shafer*, 4 Park., 45.

² 1 Whee. Cr. Cases, 436

³ *Peo. v. Goodwin*, 1 Whee. Cr. Cases, 447.

⁴ *Peo. v. Dixon*, 4 Park., 651; 3 Abb., 395.

⁵ 4 Blac. Com., 297.

⁶ *Peo. v. Dixon*, 3 Abb., Pr. R., 396.

oner, is brought before a supreme court justice on *habeas corpus*, it is said that examinations before the coroner may and should be looked into, to ascertain whether a crime has been committed; and if so, the strength of the proofs to support it; and if such examination show that the crime, if any, does not exceed the grade of manslaughter, and a fair doubt exists whether the defendant has committed any felony, bail should be taken.¹

But where the application is made after indictment, it has also been held that, in considering whether there is sufficient evidence of guilt to render conviction probable, the judge should not go behind the indictment to examine the depositions taken before the committing magistrate; that the indictment raises a violent presumption of guilt.²

Although, in another case, it is said that, under the provisions of the Revised Statutes, allowing grand juries to keep record of the testimony, the court may look into such record, and bail the prisoner if the testimony is insufficient.³

It was formerly said by Chitty, that where a felony is positively charged bail will be refused, though an alibi be supported by the strongest evidence.⁴ The author cited a case of robbery, and eight credible witnesses making affidavit that the prisoner was at another place when the robbery was sworn to have been committed, yet the court refused to admit him to bail; but ordered him to remain until the assizes.⁵ Also in another case, cited by the same author, it was alleged that the prisoner had before been tried for murder and acquitted, afterwards, on proof of facts exactly similar to those in question at his former trial, a justice of the peace issued a warrant charging him with another murder, and he was again committed; on his being brought up by *habeas corpus* his counsel offered to show his former acquittal, yet the court refused to hear the proof.⁶

On this authority Mr. Chitty laid down the rule to be, that the court will not look into extrinsic evidence at all. He states

¹ *Peo. v. Beigler*, 3 Park., 316.

² *Peo. v. McLeod*, 25 Wend., 483-568; *Peo. v. Dixon*, 3 Abb., 395; 4 Park., 651.

³ *Peo. v. Hyler*, 2 Park., 570; 10 How., 567.

⁴ Chit. Cr. L.

⁵ *Rex v. Greenwood*, 2 Str., 1138.

⁶ 1 Barnardist K. B., 250, S. C.

a case where the same question came up in regard to an inferior crime, receiving stolen goods with a guilty knowledge. The prisoner's affidavit denied his knowledge, yet the court refused to bail, saying the fact of knowledge was triable by a jury only; that to hear defensive matter, through *ex parte* affidavits as a ground for bailing the prisoner, would be to trench on the office of the jury; for, in the cases of high crimes, bail would be equivalent to an acquittal. The rule laid down in Horner's case¹ is, in effect, that stated by CHITTY.

The rule has also been laid down in this State that mere evidence of innocence cannot be used as an argument for letting the prisoner to bail, if the application is after indictment found.²

And in a still later case in the New York Oyer and Terminer, the rule was stated to be that on a motion to admit to bail on an indictment for murder, upon the testimony taken before the coroner and before the grand jury, the defendants will not be permitted to furnish other proof, either by affidavits or oral testimony, tending to establish their innocence.³

HAWKINS lays down the rule that in a case of felony, bail is only proper where "it stands indifferent whether the party be guilty or innocent," and that it is not to be allowed where the accused is notoriously guilty.⁴ This rule was followed by the Supreme Court in *ex parte* Taylor.⁵

Where the punishment is death or a degrading punishment, the presumption is strong that the accused will attempt to evade the demands of justice, and in admitting to bail regard should therefore be had, as well to the nature of the punishment, as to the probable guilt of the party, and the safest course where the guilt of the prisoner is clear, is to deny bail.⁶

Whether the prisoner is to be bailed or not, rests in the discretion of the court, but this discretion is a judicial discretion, and the court should be guided in its exercise by the circumstances of the case, and the rules of law applicable to such circumstances.

The power to bail being undeniable, the question is, will it be

¹ 1 Leach, 270, 4th London edition, 1815.

² *Peo. v. McLeod*, 1 Hill, 377; *Peo. v. Restell*, 3 How. Pr., 251. Vide *Peo. v. De Groff*, 1 Whee. Cr. C., 141.

³ *Peo. v. Hyler*, 2 Park., 570.

⁴ *Hawk. P. C.*, bk. 2, ch. 18, § 40.

⁵ 5 Cow., 39.

⁶ *Peo. v. Van Horne*, 8 Barb., 165.

a discreet and proper exercise of this power to admit the accused to bail under the circumstances of the case? In cases of felony, the prisoner cannot, as a matter of right, be admitted to bail. Whether he shall be let to bail is a question resting in the sound legal discretion of the court.¹

Justice SUTHERLAND, in *ex parte* Taylor,² says: the principal consideration is, whether the nature of the crime be such as that a recognizance would operate to secure the prisoner's appearance; the safest course in cases where the guilt of the prisoner is clear, is to deny bail.

It was held in the Court of Sessions in New York city, as a general rule, that where the prisoner is found in possession of stolen goods he cannot be bailed.³

One under indictment for felony may be bailed, if the district attorney consents.⁴

In Goodwin's case, the court said: It seems to me that the power to bail must be incident to the power to hear and determine. We have certainly power to discharge altogether. It is expressly given to us by statute, under certain circumstances, and without statute it necessarily belongs, as it appears to me, to a court having the power to try, as in all cases to which such power extends. If we have the power to grant a new gratuitous discharge, it must follow, I think, that we have the power to discharge *sub modo*. If we may discharge without bail, we may, *a fortiori*, discharge upon bail. It seems to be admitted that when any person is charged with any felony above the degree of petit larceny (as to which there is a statutory provision), he cannot demand bail as of course, but that the court or magistrate having the power, are to bail him or not, in their discretion. Legal discretion, never means, either in civil or criminal cases, arbitrary will. Legal discretion is always to be governed or directed by known and established rules, and in truth cannot be otherwise applied than to decide whether facts bring the case within the operation of such rules. The well established rule of law applicable in this case is, that a person fully and explicitly charged with a felony cannot be bailed unless there be something

¹ *Peo. v. Van Horne*, 8 Barb., 165.

² 5 Cow., 55.

³ *Peo. v. Ferris*, 1 Wh. Cr. Cas., 19.

⁴ *Peo. v. Van Horne*, 8 Barb., 158.

presented in opposition to the charge which may raise a presumption in favor of his innocence, or at least it must appear indifferent to the court or magistrate called on to bail him whether he is guilty or not.¹

Though the action of a committing magistrate or court, on question of admitting to bail, is the subject of review by an appellate jurisdiction, yet it is final as to other magistrates or courts of co-ordinate or concurrent authority on the same question, where bail had been refused by the committing magistrate, and also by the court of general sessions, in which court the indictment was pending, and a justice of the supreme court afterwards decided at chambers to admit to bail, the decision was reversed on *certiorari*, by the supreme court sitting in general term, the ground that the question was *res judicata* when brought before the justice of the supreme court. But when bail has been refused on account of insufficiency, the decision does not preclude a new application for a discharge on offering other bail.²

It was said in one case, that where the crime charged and the circumstances are such that a bail bond will afford reasonable assurance that the accused will appear to stand trial, it is right that the bond should be accepted in lieu of his personal detention; that the right to detain for trial being a restraint upon personal liberty, is limited to the necessities of society, and when other adequate security can be had, the necessity for personal detention does not arise, and a resort to it is not warranted by law, but is illegal, unjust and oppressive; and in determining whether such security would be adequate, it is necessary to consider the nature of the offence charged, the probabilities of conviction, the penalty to follow it, and the position, sex, social and family relations, and pecuniary means of the accused.³

§ 50. OF THE AMOUNT OF BAIL REQUIRED.

The Constitution of the United States⁴ and of this State⁵ both declare that excessive bail shall not be required. What bail should be called excessive, must be determined by the official letting to bail, on considering the circumstances of the case.⁶

¹ *Peo. v. Goodwin*, 1 Wh. Cr. Cas., 434.

² *Peo. v. Cunningham*, 3 Park., 531. ³ *Peo. v. Cunningham*, 3 Park., 521.

⁴ Art. 8 of Amendments.

⁵ § 5.

⁶ *Smith v. Trawl*, 1 Root, 165.

It is proper in fixing the amount of bail for the court, to take into consideration the fact that the accused is a man of fortune.¹ The recognizance should be for such an amount as will be likely to secure a compliance with its conditions. The judge ought, therefore, in determining its amount, to take into consideration the nature of the offence, and the character and property of the defendant. A person of wealth charged with a State prison offence, would forfeit his recognizance if the amount were such as would be oppressively large when required of a poor and and obscure individual. If, by the commission of a crime the accused has obtained property and retains it, the court should require a recognizance at least for a larger amount than the value of such property. The offender should not be permitted to make the crime itself an instrument for his escape. The amount should not be oppressive, but never so small as to hold out to the accused an inducement to forfeit his recognizance.²

§ 51. OF THE SURRENDER OF THE PRISONER BY HIS BAIL.

Bail may surrender their principal in criminal as well as civil cases.³

Special bail may arrest his principal at any place or at any time to render him in discharge of the bail. The bail may make the arrest himself, or delegate the power to another or others in writing, to make the arrest for him. Either the bail or his deputy may call in the aid of others in making the arrest, but such aid must be rendered in the presence of the person making the arrest.⁴

Where a private individual arrests one under recognizance to appear and answer for a criminal offence, without any deputation or authority in writing, the arrest is illegal, and does not therefore discharge the recognizance.⁵

Where the recognizance has been forfeited, the surety cannot, as a matter of right, discharge himself from liability by a surrender of the principal, though the court may, in its discretion, receive a surrender and remit the penalty in whole or in part.⁶

¹ *Ex parte Banks*, 22, Ala. Rep., 89.

² *Swan's Justice*, p. 483.

³ *Harp v. Osgood*, 2 Hill, 216; *Hawk. P. C.*, B. 2, ch. 15, § 3; 2 *Hale's P. C.* 124, ed. 1778; 1 *Chit. Cr. L.*, 104, Phila. ed., 1819.

⁴ *State v. Mahon*, 3 Harrington, 568.

⁵ *Peo. v. Moore*, 2 Douglas, 1.

⁶ *Com. v. Johnson*, 3 Cush., 454.

Bail may take their principal in another State, and may break open the outer door of the house in order to take their principal; so, also, may the person deputed by the bail.¹

The taking is not considered as the service of process, but as a continuation of the custody, which had been at the request of the principal committed to bail. The principal may, therefore, be taken on a Sunday. The dwelling house is no longer the castle of the principal in which he may place himself to keep off the bail. If the door should not be opened at midnight, the bail may break it down and take the principal from his bed if that measure should be necessary to enable the bail to take him.²

The tender of the principal in court and the refusal of the sureties to stand as bail until another court, to which it was proposed to respite the recognizance, is a virtual surrender of the principal; a right which belongs to the bail even in criminal cases. No particular form, as in civil cases, has been prescribed. When the defendants refuse to stand any longer as bail, the court shall order the principal into custody, unless new bail has been furnished. The court has not power to compel a continuance of the responsibility against the express dissent of the bail.³

If the defendant is indicted and arrested upon a warrant before a default of appearance, it is equivalent to a surrender and the bail are discharged.⁴

In case it becomes necessary for the bail to surrender his principal, and he wishes to depute some third party to make the arrest, he should procure a certified copy of the recognizance from the clerk of the court with whom it is entered or filed, and indorse thereon or annex thereto a power of attorney, deputizing such person for that purpose.

§ 52. GENERAL REQUISITES AND VALIDITY OF RECOGNIZANCES.

A recognizance is defined as an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified.⁵

¹ *Nichols v. Ingersoll*, 7 John. R., 145; *Petersdorf on bail*, 514; 8 Pick, 138 = 17 Mass., 591, 604.

² *Com. v. Brickett*, 8 Pick., 140.

³ *Peo. v. Clary*, 17 Wend., 373.

⁴ *Peo. v. Stoger*, 10 Wend., 431.

⁵ *Bouv. L. Dic.*; *Peo. v. Felton*, 36 Barb., 429.

A recognizance conditioned for the appearance of M at the next court of sessions to be held at the court house in the city of H, to be tried by a jury upon an indictment for forgery, is to be construed as requiring the appearance of M at the next court of sessions to be held in the city of H, and not at the next court of sessions to be there held at which a jury shall be summoned.¹

A recognizance taken for a purpose not authorized by law is void;² so also where the court has no authority to act.³

In a recognizance it is not necessary to set forth the offence with the particularity required in an indictment.⁴

Nor is it necessary, in order to charge the surety in a recognizance, that the principal should unite in the same recognizance; it is enough if the instrument is signed by the person sought to be charged.⁵

A recognizance which requires the party to "appear at the next court of general sessions, and answer all such matters as shall be alleged against him, and not depart the court without leave," was held valid. It was not necessary that it should recite any particular charge; the legal effect of it was to require the recognitor to answer any charge that might be preferred against him until discharged by act of court.⁶

¶ A recognizance was conditioned that the prisoner should appear at a court of general sessions to be held on the fourth Monday of February next, to answer, &c., and not depart the court without leave, it was held: 1. That the time when the prisoner was to appear was stated with sufficient certainty. 2. His default might be entered on any day during the term. He was bound to attend and answer during the term unless discharged. The English practice of giving notice to the bail where the prisoner is to be called later than the first day of the term, does not prevail here.⁷

A recognizance conditioned for the appearance of the prisoner "at the next court of sessions, to be held at the court house in

¹ *Peo. v. Derby*, 1 Park., 392.

² *Harrington v. Brown*, 7 Pick., 332.

³ 11 Mass., 337; 7 Id., 280; 12 Id., 419; 16 Id., 198.

⁴ *Peo. v. Blankman*, 17 Wend., 252.

⁵ *Peo. v. Huggins*, 10 Wend., 465.

⁶ *Gildersleeve v. Peo.*, 10 Barb., 35.

⁷ *Peo. v. Blankman*, 17 Wend., 253; *Peo. v. Stoger*, 10 Id., 431.

the city of H., to be tried by a jury," is to be construed as requiring his appearance at the next court of sessions to be held in city of H, and not at the next court of sessions there, at which a jury shall be summoned.¹

A misnomer of the court, at which the party is to appear, contained in a recognizance, *e. g.*, where the "court of session named as the "general court of sessions of the peace" will necessarily avoid it. A "*descriptio curiæ*" may be treated like "*descriptio personæ*."²

A recognizance taken in the proper court and returnable at the next court of oyer and terminer is not void for uncertainty. The fair interpretation is, that the court of oyer and terminer of the county where the indictment was found, and where it could be tried, and where the recognizance was taken, was intended.³

§ 53. RECOGNIZANCE, HOW TAKEN.

All recognizances required or authorized to be taken in criminal proceeding in open court in any court of record shall be entered in the minutes of such court, and the substance thereof shall be read to the person recognized; all other recognizances, in any criminal matter or proceeding, or in any proceeding under the laws respecting the internal police of the State shall be in writing, and shall be subscribed by the party to be bound thereby.⁴

The following is the clerk's address upon taking the recognizance of a prisoner: "You, and each of you, acknowledge yourselves to be indebted to the people of the State of New York, wit: You A, B, in the sum of one hundred dollars, and you C, in the sum of one hundred dollars, to be levied of your and each of your goods and chattels, lands and tenements to the use of said people, if default be made in the condition following, to wit: The condition of this recognizance is such, that if A, B, shall appear at the next court (or from day to day during the sitting of court), of (*state the court*), to be held in and for the county of Rensselaer, then and there to answer and stand trial upon a certain indictment against him for felony (*or whatever may be*

¹ *Peo. v. Derby*, 1 Park., Cr. R., 302.

² *Peo. v. Hawkins*, 5 How. Pr., 2.

³ *Peo. v. McCoy*, 39 Barb., 73.

⁴ 2 R. S., § 31.

offence), nor to depart the court without leave, and to abide its order and decision, then this recognizance to be void; otherwise to remain in full force and virtue. Are you, and each of you, content."

A recognizance taken in a court of oyer and terminer¹ for the appearance of a prisoner at a court of sessions to answer a pending indictment, must be entered in the minutes of the court, or it will be void. Such entry must contain all the substantial parts of the recognizance, such as the acknowledgment of the indebtedness, the offence charged, the condition, &c. A mere memorandum that a recognizance in a certain sum was taken, is not sufficient. What was said between the clerk and the bail in the taking of a recognizance cannot be proved by the certificate of the clerk.²

§ 54. OF THE THE LIEN OF RECOGNIZANCES UPON REAL ESTATE.

No recognizance taken by any court or by any officer, binds any lands, tenements, or real estate, or other property, but such recognizances are to be deemed to be mere evidences of debt.³

It is provided, however, that all recognizances given to answer a charge preferred, or for good behavior, or to appear and testify, in all cases cognizable before courts of criminal jurisdiction in the city of New York, on being forfeited, shall be filed by the district attorney, together with a certified copy of the order of the court forfeiting the same, in the office of the clerk of the said city and county, and thereupon the said clerk shall docket the same in the book kept by him for docketing of judgments, transcripts whereof are filed with him as such clerk, as if the same was the transcript of a judgment record for the amount of the penalty, and the recognizance, and the certified copy of the order forfeiting the recognizance, shall be the judgment record. Such judgment shall, in good faith, be a lien on the real estate of the persons entering into such recognizance, from the time of filing such recognizance and copy order, and docketing the same as above directed. An execution may be issued to collect the amount of said recognizance in the same form as upon a judgment recovered in the court of common pleas of said city and

¹ *Peo. v. Graham*, 1 Park., 141.

² 2 R. S., 362, § 21.

county, in an action of debt in favor of the people against the persons entering into such recognizance.¹

The same statute further provides that the costs and fees to be charged for entering such judgment and filing the necessary papers, shall be the usual fees to the clerk for filing papers and entering rules, but that the district attorney shall receive no fee therefor.²

It has been decided that the provisions of the statute above referred to, are not in contravention of the clause of the constitution, which declares that the trial by jury in all cases in which had been theretofore used, should remain inviolate forever.³

The judgments docketed upon recognizances, as above mentioned, and the executions issued thereon, are subject to the jurisdiction and control of the Court of Common Pleas of the city and county of New York, in the same manner as if such judgments had been docketed in said court.⁴

§ 55. RECOGNIZANCE, WHEN FORFEITED.

Where one under recognizance appeared in court answer when called, and without having been summoned by his bail ordered into custody, entered upon his trial, but before the conclusion of his trial, departed from the court without leave, and did not return, it was held that his recognizance was forfeited.

If the condition of the bond becomes impossible by the act of God, or of the obligee, or the conusee, the performer is excused.

As where the party dies, or intermediate the date of the recognizance and the term of the court therein mentioned, the party was arrested and committed to jail in another county, where he was kept in confinement until after the day of appearance.⁵

So, also, where a surety enters into a recognizance to the people of the State, conditioned that his principal shall appear in court to answer indictment, and subsequently, and before the day named, the principal voluntarily enlists in the militia for

¹ Laws 1844, ch. 315, art. 4, § 8.

² Idem, § 9.

³ *Gildersleeve v. The People*, 10 Barb., 35.

⁴ Laws 1845, ch. 229.

⁵ *Peo. v. McCoy*, 39 Barb., 73.

⁶ *Peo. v. Manning*, 8 Cow., 295; *Peo. v. Bartleu*, 3 Hill, 570; 3 Harrington 333.

⁷ Idem.

in the State, raised by the State under an authorized call of the President of the United States, in consequence of which he is detained by the officers of the State, and prevented from attending according to the recognizance. When called, the party is not liable upon his recognizance, for such a case is within the rule that the performance of the recognizance is rendered impossible by the act of the obligees, and also that it is prevented by act of law and the sureties are discharged.¹

A recognizance to appear and answer is not satisfied by an appearance and readiness to answer on the first day, but is broken by not appearing when called on any day of the term. It was so held, although the recognizance did not contain the clause, "That he shall not depart," &c.²

A recognizance to appear and answer before a court or officer is not satisfied by the mere corporal presence of the party; he must answer.³

It is no defence to an action upon a recognizance, conditioned for appearance, that no indictment was found at the court where the accused was bound by it to appear, since the discharge of the accused does not depend on the failure to find a bill; but where none is found, it is in the discretion of the court to discharge him.⁴

The forfeiture accrues and the right of action becomes complete on default to appear. A subsequent arrest of the prisoner and his discharge upon entering into another recognizance, and the performance of its condition, constitutes no defence to an action on the first.⁵

§ 56. ESTREATING THE RECOGNIZANCE.

The Revised Statutes provide that whenever any recognizance is directed by law to be estreated, such estreat shall be made by the entry of an order directing the same to be prosecuted.⁶

Prior to the entry of the order by the clerk of the court, the following proclamation is made by the clerk: "Hear ye, hear ye,

¹ *Peo. v. Cook*, 30 How., 110; *Peo. v. Cushney*, 44 Barb., 118.

² *Peo. v. Stager*, 10 Wend., 431; *Peo. v. Petry*, 2 Hilt., 523. See also 39 Barb., 73.

³ *Peo. v. Wilgus*, 5 Den., 58.

⁴ *Champlain v. Peo.* (2 Com.), 2 N. Y., 82.

⁵ *Peo. v. Anable*, 7 Hill, 33. ⁶ 2 R. S., 486, § 32.

hear ye. A B come forth and answer to your name, and yourself and bail or you will forfeit your recognizance." A short pause the crier then proceeds: "Hear ye, hear ye, ye. C D and E F bring forth A B, your principal, whom have undertaken to have here this day, or you will forfeit your recognizance." No one answering, the court directs the clerk enter an order upon the minutes of the court, declaring recognizance estreated and forfeited, and directing the prosecution of the same. Where the party does not appear, pursuant to the terms of the recognizance, the same is sometimes estreated but the order for a suit thereon is sometimes respited or delayed till a future day, when if the party makes default a suit is ordered.¹

Upon the estreating of the recognizance, besides the remedy by an action against the sureties upon the recognizance, the district attorney should immediately issue a bench warrant for arrest of the prisoner. In such cases, upon the re-arrest of the prisoner, it is customary to enter an order vacating the order estreating the recognizance and directing a suit; upon the suit, paying the expenses of the arrest, including the cost of court, and expenses of witnesses incident upon the failure of the prisoner to appear, and in such cases where the failure of the prisoner to appear was willful upon his part, it is also customary to refuse to re-let him to bail again.

In the city and county of New York it is not the duty of the district attorney to prosecute forfeited recognizances, unless by express order of the court of general sessions or of the court of oyer and terminer of said city and county.²

§ 57. FORFEITED RECOGNIZANCES, HOW REMITTED.

By the Code of Procedure, the county courts are given power to remit forfeited recognizances, in the same cases, and in the same manner, as such power was given prior to the Code, to the courts of common pleas.³

The Court of Common Pleas of the city and county of New York, has likewise power to remit forfeited recognizances, in the same cases, and in like manner, as such power was formerly given

¹ *Peo. v. Hainer*, 1 Den., 454.

² *Laws* 1839, ch. 343, § 2.

³ *Code*, § 30, sub. 12.

by law to courts of common pleas, and to correct and discharge the docket of liens and of judgments entered upon recognizances.¹

The provision of the Revised Statutes above referred to, in relation to the power of courts of common pleas upon this subject, were as follows: Upon the application of any person whose recognizance shall have become forfeited, or of his surety, the court of common pleas of the county in which such court was held, or in which such recognizance was taken, might, upon good cause shown, remit such forfeiture or recognizance, or any part of the penalty of such recognizance, and might discharge such recognizance, upon such terms as to said court should appear just and equitable, but such provision did not authorize the court to remit or discharge any recognizance taken in one county for the appearance of any person in another, but the power of remitting or discharging such recognizance was to be exercised exclusively by the court of the county in which such person should be bound to appear.²

The statute further provided, that no such application should be heard until reasonable notice should be given to the district attorney of the county, and until he had an opportunity to examine the matter and prepare to resist such application.³

The old statute further provided, that in the order granting the remission of the penalty of the recognizance, or any part thereof, the concurrence of the county judge should be expressed, and that no such application should in any case be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty of such recognizance.⁴

§ 58. SUITS ON RECOGNIZANCES.

Whenever any recognizance to the people of this State shall have become forfeited, the district attorney of the county in which such recognizance was taken shall prosecute the same by action of debt for the penalty thereof; and the proceedings and pleadings therein shall be the same in all respects as in personal actions for the recovery of any debt, except that it shall not be necessary to allege or prove any damages by reason of a breach

¹ Laws 1854, ch. 198, § 6.

² 2 R. S., 487, §§ 38, 39.

³ Idem, § 40.

⁴ Idem. §§ 40, 41.

of the condition of such recognizance; but on such breach found or confessed, or upon judgment by default being entered against the defendants, the judgment shall be absolute for the penalty of the recognizance.¹

All the provisions of the Code of Procedure are applicable to all recognizances forfeited in any court of sessions or of oyer and terminer, in any of the counties of this State.²

And by the same act all laws, or parts of laws, or provisions of statutes in any wise conflicting with the application of the Code of Procedure to forfeited recognizances are repealed.³

As to suits upon recognizances in the city and county of New York, see preceding section entitled, "Of the lien of recognizances upon real estate."⁴

§ 59. POSTPONING THE TRIAL ON THE DEFENDANT'S APPLICATION

In case the defendant is not ready for a trial by reason of the absence of his witnesses, or for other sufficient reason, his counsel makes an application to the court for a postponement of his trial until some subsequent term of the court; or, as it is technically called, for an order of continuance.

The old English practice of *traversing* the indictment, as technically called, in cases of misdemeanors—that is, that the defendant was not bound to submit to be tried at the same assizes or sessions at which the bill was found; but had a right to traverse it, and to put off his trial until the next following assizes or sessions in the same county—does not apply with us.⁵

No notice of the application is required to be given to the district attorney; the application is generally made at an early hour in the session of the court, although sometimes the prisoner's counsel waits until the case is called up for trial by the district attorney, and then reads the affidavit and makes his motion for an order of continuance. The trial is generally postponed until the next term of the same court, or the next term of the oyer and terminer or of sessions to be held in the county, in which the case may happen to be; although, from the particular cir-

¹ 2 R. S., 485, § 27; vide 10 Barb., 35; 4 Wend., 387.

² Laws 1855, ch., 202, § 1; see § 471 of the Code.

³ Id., § 2.

⁴ Ante p. 301.

⁵ Arch. Cr. Pl., vol. 1, § 110; 4 Blac. Com., 351.

stances of the case, the court will sometimes put the trial off to a more distant time.¹

The affidavit of the prisoner is receivable even in capital cases.² The affidavit must in general be made by the party applying;³ though, in some cases, his attorney or a third person has been allowed to do it in his stead, as if he be abroad or unable to appear.⁴

To obtain an order for putting off the trial, the affidavit should be full, satisfactory, and direct as to material allegations for a continuance.⁵ It should state the facts, in order that the court may determine their importance. The defendant's opinion of the importance of undisclosed facts, can constitute no safe or proper grounds for the action of the court.⁶ It should state the names and places of abode of the absent witnesses, and that they are material to the defence.⁷

In resisting the motion, the district attorney may state facts touching the merits of the application, and the demeanor, conduct and conversation of the prisoner in the presence of the court, may properly be taken into consideration; and the minutes of the grand jury may be referred to, for the purpose of ascertaining the materiality of the matters proposed to be proved by the absent witnesses; and in deciding upon such application, the same credence cannot be given to the affidavit of a person indicted for felony as to the uncontradicted affidavit of a party to a civil action.⁸

In a note to HETTRICK's case,⁹ the observation is made that, let the depravity of the criminal be ever so great, he may, by offering the court sufficient reasons, obtain a postponement of his trial. But it is due to him *ex gratia*, and not of right. He has not such absolute right even upon the strongest affidavits, and though his trial be brought on immediately after his indictment.

¹ 1 Chit. Cr. L., 494.

² Com. v. Knapp, 9 Pick., 496.

³ Id.

⁴ Peake's N. P., 97; Barnes, 448; 1 Chit. Cr. Law, 493; 9 Pick., 515.

⁵ Humph., 599.

⁶ 10 Yerg., 258; 8 Sme. & Marsh, 401.

⁷ 8 East., 35; Fost., 2; 8 Gratt., 695; Hurd's Case, 5 Leigh., 715; Gordon v. Spencer, 2 Black., 286. Vide Peo. v. Horton, 4 Park. Cr. R., 222.

⁸ Peo. v. Horton, 4 Park. Cr., 222.

⁹ 1 Whee. Cr. Cases, p. 29.

¹⁰ 1 Chit. Cr. L., 491.

But the court may exercise its discretion upon all the facts of the case, though it should be careful to give the prisoner every fair advantage.¹ It is said that the trial will be postponed:

1. If by the publication of the circumstances of the case, the public mind has been improperly influenced.²

2. Where a person charged consents to become a witness and fully and fairly discloses the guilt of his associates. In such case, if he is prosecuted at all, the court will postpone the case to give him time to apply for a pardon.³

3. Where a witness whose evidence is material to the trial has no sense of the obligation of an oath, the case will be adjourned, and the witness instructed in the principles of moral duty.⁴

4. Where the counsel of the prisoner is unable to attend through sickness.⁵

5. By the affidavit of the absence of a material witness.⁶ The trial will not be postponed.

1. Where the witness resides in a foreign country, out of the reach of the process of the court and is not expected to return.⁷ In such case, the prisoner should apply for a commission to examine the witness.

2. Where the prisoner has been guilty of laches or delay.⁸

3. Where the testimony expected goes to character only.⁹

That an indictment was recently found is not a ground for putting off a trial in a capital case, especially where the prisoner has been a long time in prison charged with the offence.¹⁰

Formerly it was held that an affidavit, properly verified, of the absence of a material witness was always deemed sufficient to postpone a trial, and without stating the facts such witness would be expected to prove. It was ruled to be sufficient in cases of treason, felony and misdemeanors; but courts of law have become a little more strict. The case of Radcliffe¹¹ is a leading

¹ *Peo. v. Horton*, 4 Park. Cr., 222.

² 1 Burr., 510-511.

³ *Cow.*, 339-340.

⁴ 1 Leach Cas., 430, n. a.

⁵ *Say. Rep.*, 63.

⁶ *Foster*, 2.

⁷ 8 East., 37; 3 Burr., 1514; 1 Black. Rep., 510.

⁸ 1 Black. Rep., 514.

⁹ 8 East., 34.

¹⁰ *Peo. v. Fuller*, 2 Park., 16.

¹¹ *Foster*, p. 40.

one. The prisoner was charged with treason, and the postponement of the trial was refused, although the affidavit was in the usual form and stated the witness was material; the trial proceeded and the prisoner was afterwards executed.

The following note, inserted between brackets, in *Bac. Abr.*, tit. trial, vol. 6, letter H., p. 650, seems too full of good sense to pass unnoticed. It lays down the rule, where there is *no cause of suspicion*, the affidavit should state :

1. That the witness is material.
2. That the prisoner has endeavored to obtain his attendance.
3. That he is in hopes of procuring it.

But if there is *cause of suspicion* the court should be satisfied from *circumstances*:

1. That the witness is material.
2. That the prisoner has not been guilty of laches.
3. That he has a reasonable expectation to have his attendance.¹

The following cases in point have been decided in the City Hall in the city of New York, and the above rule fully recognized. In *Bugham's case*² the prisoner was indicted for larceny, and made an affidavit in the common form for the postponement of the trial; the affidavit also stated that he intended to prove by the witness that he took the article by mistake for his own. Counter-affidavits were admitted to show that the witness could not be material; they prevailed, and the prisoner was convicted and sentenced. In another case³ the prisoner presented an affidavit, stating that a captain, who was gone to Savannah, was a material witness; without whose testimony she could not safely go to trial, and that she expected to be able to procure his attendance at the next term.

The court refused the motion for a postponement, unless the prisoner would state the facts she expected to prove by the witness, which was not done, and the trial proceeded.⁴

In the above case, the court remarked: In ordinary cases an affidavit of an absent witness has been sufficient in this court to put off the trial to the next term. But cases may occur where

¹ Vide 3 Burr, 1514; 1 Black. Rep., 436.

² City Hall Rec., vol. 1, p. 30.

³ *Peo. v. Foot*, 1 Whee. Cr. Cases, 70.

⁴ Vide 1 Whee. Cr. Cas., vol. 1, page 30.

the jury. In all such cases the questions are: 1. Is the witness material. 2. Has the defendant been guilty of laches. 3. Can the witness be procured at the next court. The court has a discretion as to putting off, but it is a legal discretion.¹

§ 60. TRIAL POSTPONED BY NEGLECT OF PROSECUTOR.

The trial of the cause may also be put off by the mere laches or neglect of the prosecutor to bring it on.

§ 61. PRISONER WHEN ENTITLED TO RELEASE BY REASON OF NEGLECT TO TRY HIM.

If any prisoner indicted for an offence triable in the court of sessions and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next term of the court of sessions, which shall be held in the county in which he is imprisoned after such indictment found; he shall be entitled to be discharged, so far as relates to the offence for which he was committed.²

And if any prisoner indicted for any offence not triable in a court of sessions, but which may be tried in a court of oyer and terminer and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next court of oyer and terminer, which shall be held in the county in which he is imprisoned after such indictment found, he shall be entitled to be discharged, so far as relates to the offence for which he was committed.³

But if satisfactory cause shall be shown by the district attorney to any court to which application shall be made, under either of the two last sections, for detaining such prisoner in custody or upon bail, until the sitting of the next court in which he may be tried, the court shall remand such prisoner, or shall hold him to bail as the case may require.⁴

§ 62. THE TRIAL BEING POSTPONED, WITNESSES TO BE RECOGNIZED TO APPEAR AT TRIAL.

Whenever the trial of an indictment shall be postponed by the court in which the same shall be pending, it shall be the duty of

¹ *Peo. v. Vermilyea*, 7 Cow., 368. * 2 R. S., 737, § 30.

² *Idem*, § 31.

⁴ *Idem*, § 32.

the district attorney to cause all the witnesses on the part of the people in attendance, deemed by him material to be recognized, to appear at the time and place to which such trial shall have been postponed.¹

The court may, in case of the refusal of the witness to enter into the recognizance, commit him to the common jail of the county, to secure his attendance as a witness at the court to which the trial has been postponed; and in case of the insolvency of the witness in its discretion, may order him to find sureties to secure his attendance as such witness, or in default thereof, to stand committed until he enter into a recognizance with sufficient sureties. Where the recognizance is entered into in open court, the clerk, before making a record of the same upon his minutes, makes the following address to the witness and his surety, if one:

“ You, and each of you, acknowledge yourselves to be indebted to the people of the State of New York, to wit: You A, B, in the sum of one hundred dollars, and you C, D, in the sum of one hundred dollars, to be levied of your, and each of your goods and chattels, lands and tenements to the use of the said people, if default be made in the condition following, to wit: The condition of this recognizance is such that if A B shall appear at the next court of (sessions or oyer and terminer), to be held in and for the county of Rensselaer, then and there to testify on the trial of an indictment against E F for grand larceny (or whatever may be the offence), not to depart the court without leave, and to abide its order and decision, then this recognizance to be void; otherwise, to remain in full force and virtue. Are you, and each of you, content.”

In case of the commitment of the witness to jail for inability to furnish sureties for his attendance at the adjourned court, he may enter into such recognizance at any future day of the same term; or in case he does not succeed in finding sureties until after the adjournment of the court, he may, with sufficient sureties, enter into a written recognizance with the same condition as above.

A recognizance for the appearance of witnesses must contain an acknowledgement of indebtedness to the people, and must mention the offence charged. An entry in the clerk's minutes under the title of the cause, stating that R was recognized in

¹ Laws 1845, ch. 180, § 19.

\$100 to appear at, &c., to testify for the people in the cause, is not a recognizance and cannot be sued as such.¹

§ 63. WITNESSES IN SUCH CASES MAY BE ATTACHED AND PROSECUTED FOR FAILURE TO APPEAR.

The court before whom any witness on the part of the people in a criminal prosecution, shall have been recognized to appear by recognizance taken before a magistrate or a court of record having criminal jurisdiction, may proceed against such witness for any default in appearing pursuant to the condition of such recognizance by process of attachment, in the same manner as in proceedings with like proceedings therein as if such witness had failed to appear in obedience to a subpoena; and the recognizance of such witness filed with the clerk or the court, if taken before a magistrate, or the record of the recognizance, if taken before a court of record, and the entry in the minutes of the clerk of the court of the default of such witness shall be sufficient evidence to issue such process of attachment. The issuing of an attachment against a witness, as above provided, is not a bar to the production of his recognizance. District attorneys are prohibited from receiving any fees for the appearance of any witness who has been recognized to appear in the same prosecution at the same court designated in such subpoena.²

Before an attachment is issued in case of the failure to appear of a witness, who has been placed under a recognizance to appear and testify, a proclamation should be made by the court for the witness to appear the same as in case of disobedience to a subpoena duly served.

§ 64. PRISONERS IN JAIL ALLOWED TO CONVERSE WITH THE COUNSEL.

Persons detained for trial may converse with their counsel with such other persons as the keeper, in his discretion, may allow, but prisoners under sentence shall not be permitted to hold any conversation with any person except the keeper or inspectors of the prison, unless in the presence of a keeper or inspector.³

¹ *Peo. v. Rundle*, 6 Hill, 506.

² *Laws of 1845*, ch. 180, § 20.

³ 2 R. S., part 4, chap. 3, tit. 1, art. 1, § 7.

§ 65. PRISONERS, WHEN NOT TO BE REMOVED BY HABEAS CORPUS DURING SESSION OF OYER AND TERMINER.

After the court of oyer and terminer shall commence its sessions in any county no prisoner, detained in the common jail of any such county upon any criminal charge, shall be removed therefrom by any writ of *habeas corpus*, unless such writ shall have been issued by such court of oyer and terminer or shall be made returnable before it.¹

§ 66. OF SUBPŒNAS FOR WITNESSES FOR THE PEOPLE.

The district attorney of every county has power to issue subpœnas for witnesses in support of any prosecution to appear at any court without the seal of such court, and every such subpœna, subscribed by the district attorney issuing the same, is as valid and effectual as if the seal of the court at which any witness named therein is required to appear had been affixed thereto.²

§ 67. SUBPŒNAS FOR THE DEFENDANT, AND HOW ISSUED.

The clerk of any county in which an indictment shall be found, or any proceeding before the sessions shall be instituted, upon the application of the defendant, without requiring any fees, shall issue subpœnas, as well during the sitting of any court as in vacation, for such witnesses as such defendant shall require residing in or out of the county.³

If such subpœna be issued to compel the attendance of any witness at any court of sessions it shall be issued under the seal of the county court of the county, shall be tested in the name of the first or senior judge of such county, and on the day it is issued, and shall be made returnable at any day of the sitting of the court at which the attendance of the witness shall be required.⁴

If such subpœna be issued to compel the appearance of any witness at any court of oyer and terminer, it shall be issued under the seal of such court, if there be one; and if there be none under the seal of the county court of the county, shall be tested in the name of the circuit judge of the circuit on the day

¹ 2 R. S., part 4, chap. 3, tit. 1, art. 2, § 27.

² 2 R. S., 729, § 66.

³ 2 R. S., 729, § 62.

⁴ Id., § 63.

it is issued, and shall be made returnable at any day of the term of the court at which the attendance of the witness shall be required.¹

§ 68. WITNESSES IN A FOREIGN COUNTY.

Whenever it shall become necessary to send subpoenas in a foreign county for witnesses on criminal process, the district attorney is empowered to send them to the sheriff of the county in which the said witnesses reside, whose duty it shall be to serve the same and make his return without delay to such district attorney.²

§ 69. FEES NOT TO BE TENDERED WITNESS.

It shall not be necessary to pay or tender any fees whatever to any witness subpoenaed on the part of the people of this State in support of any prosecution, or to any witness subpoenaed on the part of any defendant in any indictment; but such witness shall be bound to attend as if the fees, allowed by law to witnesses in civil cases, had been duly paid him.³

§ 70. DISOBEDIENCE OF SUBPENA.

Disobedience of every subpoena, issued pursuant to the foregoing provisions, shall be punished in the same manner and under the like proceedings as provided by law in cases of subpoenas returnable at any circuit court; and the person guilty of such disobedience shall be liable to the party, at whose instance the subpoena issued, in the same manner and to the same extent as in cases of subpoenas issued in any civil suit.⁴

In case of the failure of the witness to appear and testify in obedience to a subpoena duly served upon him, he is called by the crier of the court as follows:

"A B come forward and testify in this issue, joined between the people of the State of New York and C D, upon an indictment for grand larceny (or other offence), according to the command of a subpoena therein served on you or your default witness entered."

The district attorney thereupon produces proof of due service of the subpoena upon the witness; the clerk enters his de-

¹ 2 R. S., 729, § 64.

² 2 R. S., 729, § 67.

³ 2 R. S., 730, § 69.

⁴ 2 R. S., 729, § 68.

and an order that an attachment issue. The attachment is signed by the clerk of the court and district attorney, and sealed with the seal of the court. The proceeding upon obtaining an attachment for disobedience to a subpoena requiring the witness to attend and testify before a grand jury is the same, except that the crier, in calling the witness, calls him to come forward and testify in a certain complaint preferred against C D before the grand jury for grand larceny (or other offence).

§ 71. WHEN PRISONERS MAY ALSO BE BROUGHT BEFORE COURTS AS WITNESSES.

Whenever it shall appear to the court in which any indictment is pending, and to be tried against any person for any offence committed by him while imprisoned in any county prison or any one of the State prisons, on the person of any other individual confined in such jail or State prison, that any other person confined in any county prison or in any of the State prisons is an important witness in behalf of the person so indicted, such court is authorized to grant a writ of *habeas corpus* for the purpose of bringing such prisoner before such court, to testify upon the trial of such indictment, in behalf of the party making the application; and every person when brought up on such writ, may be examined as a witness on such trial, and shall be competent to testify thereon in behalf of the defendant or the people, notwithstanding his conviction and imprisonment.¹

§ 72. FOREIGN AND POOR WITNESSES, HOW PAID.

When any person shall attend a court of oyer and terminer or a court of sessions as a witness, in behalf of the people of this State, upon the request of the public prosecutor, or upon a subpoena, or by virtue of a recognizance for that purpose, and it shall appear that such person has come from any other State or territory of the United States, or from any foreign country, or that such person is poor, the court may, by an order in its minutes, direct the county treasurer of the county in which the court shall be sitting, to pay to such witness such sum of money as shall seem reasonable for his expenses.²

¹ R. S. 5th ed., vol. 3, p. 1101, §§ 178, 179.

² R. S., 753, § 23.

When such foreign or poor witness makes an application to the court for compensation for his expenses, the following oath is administered to him:

"You shall true answers make to such questions as shall be put to you touching your application for the expenses of your attendance at this court as a witness, in behalf of the people of this State; so help you God."

Under this application, the witness may be allowed for traveling expenses and board, but cannot be paid for fees as such witness.

A similar provision to the above, exists where the witness attends the circuit court upon the trial of an indictment removed from a court of oyer and terminer into the Supreme Court.¹

The clerk of the court by which such order shall be made, is required to immediately make out and deliver a certified copy thereof to the person in whose favor the same is made, without exacting any fee for such service; and upon the production of such certified copy to the county treasurer, or as soon thereafter as he shall have sufficient moneys in his hands, he shall pay the person authorized to receive the same, or to the order of such person, the sum of money so directed to be paid, which shall be allowed to him in his accounts.²

§ 73. COMMISSIONS FOR WITNESSES.

In the absence of any statutory provision authorizing the people to issue a commission to examine witnesses, none exists. The statute, however, provides for the examination of witnesses upon a commission upon the behalf of the defendant, as follows: Whenever an issue of fact is joined upon any indictment, the defendant therein may apply to the court in which such indictment is pending, for a commission to examine any material witness residing out of this State, and such court may grant the same upon the same proof, and in the like cases and on similar terms as provided by law in civil cases; and the officer prosecuting in behalf of the State, shall be permitted to join in such commission, and to name witnesses on the part of the people.³

Interrogatories to be annexed to such commission, shall be

¹ Laws 1846, ch. 59,

² 2 R. S., 753, §§ 25, 26.

³ 2 R. S., 731, § 77. See practice in civil cases, 3 Hill, 295.

settled, and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the depositions taken thereon shall be read in the same cases and with the like effect as in civil suits.¹

Witnesses cannot be examined *de bene esse* at the instance of the public prosecutor after indictment found, though they may be at the instance of the defendant, and after issue joined upon an indictment, the defendant may examine witnesses residing out of the State upon commission, and the public prosecutor is entitled to join in the commission and name witnesses on the part of the people; but there is no authority at common law for taking depositions in criminal cases out of court without the consent of the defendant. The general rule in criminal cases is, that witnesses must appear in court and be confronted by the accused party, and the exception to this rule recognized at common law is that of dying declarations in prosecutions for homicide.²

§ 74. OF THE EXAMINATION OF WITNESSES CONDITIONALLY BY THE DEFENDANT.

After an indictment shall be found against any defendant he may have witnesses examined in his behalf conditionally, on the order of a judge of the court in which the indictment is pending in the same cases, upon the like notice to the district attorney, and with the like effect in all respects as in civil suits.³

A deposition taken conditionally in the case of a charge for a criminal offence and before indictment, which is entitled in a court of sessions where there is no suit or proceeding pending, and in a suit which is not yet commenced, and which throughout refers to the accused not by their individual names but as defendants, cannot be read on the trial of an indictment afterwards preferred on that charge, because of the rule that on such a deposition the witness could not be convicted of perjury in false swearing.⁴

§ 75. OF THE REMOVAL OF INDICTMENTS BEFORE TRIAL FROM THE COURT OF SESSIONS TO THE COURT OF OYER AND TERMINER.

The Revised Statutes provide for the removal of indictments

¹ 2 R. S., 731, § 78.

² Peo. v. Restell, 3 Hill, 289.

³ 2. R. S., 731, § 79.

⁴ Peo. v. Chrystal, 8 Barb., 545; vide § 73, ante.

from the courts of sessions to the courts of oyer and terminer of the same county; thus every person, against whom an indictment shall be pending in the court of sessions, may apply to any justice of the Supreme Court for an order to remove such indictment to the court of oyer and terminer of the county in which the same was found.¹

The removal of indictments before trial from the court of sessions to the court of oyer and terminer, as above stated, is now by verified application and order thereon of a Supreme Court justice. The removal of indictments by certiorari from a court of sessions, before trial thereon, to the Supreme Court or to a court of oyer and terminer has been abolished.²

Where an indictment has been found at the sessions for an offence triable in that court, and the cause is subsequently removed into the oyer and terminer by an order of a circuit judge, the oyer and terminer has power to order the indictment to be sent back to the sessions for trial, and this without notice to the accused.³

No other person than the county judge of the county courts of the county of Erie, being of the degree of counsellor at law in the Supreme Court, or the justices of the supreme court or superior court, have power to allow any writ of certiorari, or make an order for the removal of any criminal cause from the court of sessions of said courts, and any one of such officers have such power. The recorder of the city of Buffalo and either of the Supreme Court or superior court judges, and no other persons, have the like power as to the recorder's court in said city.⁴ No such writ of certiorari shall be allowed or order made without an affidavit made, stating the facts and circumstances on which the application therefor is founded; nor shall any such writ be allowed or order made unless at least four days' notice in writing of the application therefor, shall have been served on the district attorney of said county, together with a copy of the affidavit on which such application is made. The district attorney shall then be allowed

¹ 2 R. S., 732, § 86.

² 2 R. S., 732, § 91.

³ *Peo. v. Sessions*, 3 Barb., 144.

⁴ Laws 1846, ch. 142, § 1, as modified 1854, ch. 96, § 12, and 1857, ch. 30 § 1; 2 R. S., 710, § 36.

introduce affidavits and other evidence in opposition to such application.¹

§ 76. CONTENTS OF THE APPLICATION.

Such application shall set forth a copy of the indictment, or the substance thereof, the time when it was found, the proceedings thereon, if any, and the facts and circumstances rendering a removal thereof expedient, and shall be verified by affidavit.²

§ 77. WHEN ORDER TO BE GRANTED.

The officer, to whom such application is made, shall grant an order that such indictment be removed to, and that the defendant therein be tried at the next court of oyer and terminer, to be held in the county where such indictment was found, unless it shall appear that the application therefor was not made in due season, or that such removal will produce any injurious delay, or in any way lead to prevent a due prosecution of such indictment.³

§ 78. RECOGNIZANCE THEREON.

Before granting any such order to any defendant not being in actual confinement, such officer shall take from such defendant a recognizance, with sufficient sureties, in such penalty as such officer shall direct, conditioned that the person indicted shall appear at the next court of oyer and terminer to be held in the county where such indictment was found, and at such other time as such court shall appoint, and if no plea shall have been made to such indictment, that he will plead to the same, and that he will stand trial upon the issue joined or which shall be joined thereon, and that he will not depart such court of oyer and terminer without leave.⁴

§ 79. FILING THE RECOGNIZANCE AND DELIVERY OF THE ORDER.

No such order for the removal of an indictment shall be effectual in the case of any defendant not being in actual confinement, unless a recognizance taken, as hereinbefore directed, be delivered at the same time with such order, and be filed with the

¹ Laws 1846, ch. 142, § 3; 2 R. S., 710, § 37.

² 2 R. S., 732, § 87.

³ 2 R. S., 732, § 88.

⁴ 2 R. S., 732, § 89.

clerk of the court, nor unless such order be delivered before an judgment rendered on such indictment, and before any jury shall be sworn to try such indictment.¹

§ 80. OF THE REMOVAL OF INDICTMENTS FROM THE COURT OF OYER AND TERMINER TO THE SUPREME COURT BEFORE TRIAL.

The removal of indictments before trial from the court of sessions to the court of oyer and terminer, as we have already seen, is by a verified application and order thereon of a Supreme Court justice. Should it become necessary to remove an indictment pending in the court of oyer and terminer, before trial, into the Supreme Court, the removal is effected by a writ of certiorari, and no such certiorari shall be effectual unless allowed by a justice of the Supreme Court, and no other officer has authority to allow such writ.²

A certiorari to remove a criminal action from the oyer and terminer to the Supreme Court may issue at the instance of the district attorney, as well as on application of the defendant.³

§ 81. RECOGNIZANCE UPON SUCH CERTIORARI.

Before allowing any writ of certiorari to remove an indictment from any court of oyer and terminer, the officer to whom application for such allowance shall be made shall take from the defendant a recognizance, with sufficient sureties, and in such penalty as such officer shall direct, conditioned that the defendant prosecuting such certiorari will appear at the return day there in the Supreme Court and plead to such indictment, if issue not already joined thereon, and will not depart such court without its leave, and that he will obey the orders and rules of such court in respect to the trial of such indictment, and the judgment and all other proceedings thereon.⁴

§ 82. WHEN SUCH RECOGNIZANCE NOT REQUIRED.

Whenever any indictment shall be pending in any court of oyer and terminer, for the crime of treason against the people of this State, or of murder, or of arson in the first degree, and the

¹ 2 R. S., 732, § 90.

² 2 R. S., 732, § 92.

³ *Peo. v. Baker*, 3 Abb., 42; 3 Park., 181; Vide 15 Barb., 153.

⁴ 2 R. S., 733, § 93.

proper circuit court by the district attorney of the county where the same was found, in the same manner in all respects as if joined in the Supreme Court in civil cases, and the same rules, so far as they shall be applicable, shall be had

Whenever an indictment is removed from a court of oyer and terminer, or any other court, into the Supreme Court, and a conviction had thereon at a circuit court, judgment may be rendered thereon by such circuit court, or any other circuit court, and may be held in the same county, with the same effect as if oyer and terminer may render judgment upon a conviction therein.³

When an indictment has been removed into the Supreme Court by certiorari before trial, it must be tried at the circuit court, and other issues pending in the Supreme Court, and not at oyer and terminer.⁴

Where a criminal cause is removed by certiorari into the Supreme Court, the defendant is obliged to proceed to trial without delay, for any rule, and no notice of trial is necessary. A failure to try is a forfeiture of his recognizance, but if there be good reasons for postponing his trial, a new recognizance may be granted.⁵

§ 84. OF CHANGING THE PLACE OF TRIAL.

Sometimes happen that a fair and impartial trial cannot be had in the county where the indictment was found, and it may be expedient to have the trial take place in some other county, where the minds of the persons who are likely to serve

³ 847, ch. 12.

⁴ 733, § 94.

⁵ 1859, ch. 462, § 1, p. 1074.

Ruloff, 3 Park., 401.

Winchell, 7 Cow., 160.

as jurors upon the trial of the indictment, are unprejudiced and their judgment unbiased.

The application is made upon motion in the usual manner, by affidavits, but the venue will not be changed in a criminal case upon affidavits expressing mere belief that the prisoner cannot obtain a fair and impartial trial in the county where the indictment was found, but the affidavits must set forth the facts and circumstances so that the court may judge whether the application is well founded; and the allegation that a fair and impartial trial cannot be had, must be clearly established, or the venue will not be changed.¹

The venue in a criminal case may be changed on the motion of the district attorney as well as the defendant,² if it appears that a fair and impartial trial cannot be had in the county where the indictment was found. There is no fixed rule defining what shall or shall not be received as proof of the fact that such trial cannot be had, and the venue may be changed, though there has been an actual experiment made by way of trying the cause, or even empanneling the jury in the county where the venue is laid.³

Where the indictment is against several persons, and enough is shown on the part of the prosecution to make a change of the place of trial proper as to one defendant, the change will be made as to all the defendants, although it is a case in which every defendant is entitled to a separate trial.⁴

And where it appears in opposition to such application that the defendant's witnesses are poor, and unable to bear the expenses of a journey to another county, and that the defendant are also destitute of property, the court may require as a condition to changing the place of trial, that the district attorney procure some arrangement to be made by which the county in which the indictment was found, shall pay the necessary expenses of the indigent witnesses subpoenaed on behalf of the defendants, and attending at any court in which the trial shall not be postponed at their instance.⁵

That a fair and impartial trial, by any means within the reach of the law, cannot be had in the county where the venue was

¹ *Peo. v. Bodine*, 7 Hill, 147.

² 1 Hill, 179; 3 Park., 181.

³ *Peo. v. Webb*, 1 Hill, 179.

⁴ *Peo. v. Baker*, 3 Park., 181.

⁵ *Idem*.

laid, is a sufficient reason for changing the place of trial in a criminal case. In deciding upon such application the court should be governed by the facts shown, and not by the mere impressions or conclusions of the parties and witnesses, and it is not indispensable, to a change of venue in a criminal case, that there should have been an ineffectual attempt to obtain a jury in the county where the venue was laid.¹

Formerly, in order to make a motion to change the venue upon the trial of an indictment, it was necessary, as a preliminary matter, to remove the indictment from the court where it was pending into the Supreme Court, by a writ of certiorari;² the statute declaring that the indictment should be tried in the county where found, unless for special causes the Supreme Court should order an indictment removed into that court to be tried in some other county;³ in which case the Supreme Court, at a special term thereof, had power to order the trial to be had in some other county.⁴ But by a late statute, courts of oyer and terminer have the same power, to change the place of trial upon any indictment pending therein, as the Supreme Court now has to change the place of trial in civil actions, and when the place of trial shall be so changed the indictment shall be deemed to be pending in the court of oyer and terminer of the county to which the place of trial has been so changed, and such court may proceed to try the same and render judgment thereon.⁵

If the indictment should be pending in the court of sessions and triable therein, a preliminary motion should be made to send the same to the next court of oyer and terminer to be held in the county, for the purpose of making the application in the oyer and terminer to change the venue,⁶ and in case the court of sessions should refuse such application then an application should be made to a Supreme Court justice to remove the indictment into the oyer and terminer by order,⁷ and the motion to change the venue, be made in said last mentioned court.

¹ *Peo. v. L. I. R. R.*, 4 Park., 602.

² *Vide ante.*

³ 2 R. S., 733, § 1; *Peo. v. Barker*, 3 Park, 181; 1 Hill, 179; 7 Hill, 147; *Peo. v. Rulloff*, 3 Park, 401.

⁴ *Peo. v. Barker*, 3 Park, 181.

⁵ Laws 1859, ch. 462, p. 1074.

⁶ 2 R. S., 209, §§ 6, 7.

⁷ *Ante.*

Ordinarily, where the place of trial is changed, an adjoining county should be selected; but there is no express limitation, and if the necessity which should require any change should call for a more remote county, that should be selected.¹

Where a prosecution for crime is transferred from the county where the venue is laid to another county, the expenses of the trial of the indictment shall be a charge upon the county from which the same was transferred.²

In indictments for a libel a special provision of the statute exists, by which the defendant may in all cases claim the right by motion to the Supreme Court in the district where he resides, to be tried in the county where the libel was printed, on executing a bond to the complainant in the penal sum of not less than two hundred and fifty nor more than one thousand dollars, in the discretion of the court, conditioned, in case the defendant be convicted, for the payment of all the complainant's reasonable and necessary travelling expenses, incurred in going to and from his place of residence and the place of trial, and the necessary expenses in attendance on the trial in the prosecution of the defendant; such bond is to be signed by two sufficient sureties, to be approved by any judge of any court of record exercising criminal jurisdiction.

It is further provided that nothing in the above act shall abridge, or in any manner affect the right or power of any competent court to change the place of trial of indictments for libel in the manner now provided by law.³

¹ *Peo. v. Barker*, 3 Park., 181.

² 1 R. S., 421, § 17.

³ 2 R. S., 731, § 80, *et seq.* Laws 1852, ch. 165

SECTION III.

OF THE PROCEEDINGS FROM AND INCLUDING THE TRIAL, DOWN TO AND INCLUDING THE VERDICT.

- Section LXXXV.—OF THE TRIAL OF THE INDICTMENT.
 LXXXVI.—CERTAIN PROVISIONS IN CIVIL CASES ADOPTED ON THE TRIAL OF THE INDICTMENT.
 LXXXVII.—DEFENDANT TO BE PRESENT AT TRIAL.
 LXXXVIII.—OF SEPARATE TRIALS BY DEFENDANTS JOINTLY INDICTED.
 LXXXIX.—PROCEEDINGS WHEN PRISONER IS INSANE AT THE TRIAL.
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| Section | CXVIII.—OF DISCHARGING THE JURY IN CASE OF THEIR INABILITY TO AGREE. |
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§ 85. OF THE TRIAL OF THE INDICTMENT.

Having already treated of the proceedings had in the court anterior to the arrest and arraignment of the defendant, and of the subsequent proceedings had after indictment duly found by the grand jury and presented to the court, we have now arrived at a stage of the proceedings where the defendant is put upon his trial before a petit jury. All issues of fact are to be tried by a jury in the county where the indictment was found, unless, for special causes, the indictment is removed for trial into some other county.¹

We shall, in the following pages, treat of the various proceedings which may be taken by either party from the time the defendant is placed upon his trial down to the sentence and judgment of the court. We shall first treat of the organization and empanneling of the jury and subsequently of the action of the counsel for the respective parties and of the court and jury during the trial. It is not within the intention of the author to point out all the irregularities and errors which may be committed during the trial, but simply to mark out the course of practice to be adopted upon the trial. Such irregularities and errors which have been cited in the books as constituting sufficient grounds for a new trial, are too numerous to be embraced in a work of this kind, and are in themselves, if fully discussed, sufficient to comprise a separate work.

§ 86. CERTAIN PROVISIONS IN CIVIL CASES ADOPTED ON THE TRIAL OF INDICTMENTS.

The proceedings prescribed by law in civil cases, in respect to the empanneling of juries, the keeping them together, and the manner of rendering their verdict, are to be had upon trials of indictments, and the provisions of law in civil cases relative to

¹ 2 R. S., 733, § 1. See ante.

compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempts to enforce the remedies and protect the rights of parties, also extend to trials and other proceedings on indictments, so far as they may be, in their nature, applicable thereto, subject to the provisions contained in any statute.¹

§ 87. DEFENDANT TO BE PRESENT AT TRIAL.

No person indicted for any felony can be tried unless he be personally present during such trial; nor can any person indicted for any other offence be tried unless he be present, either personally or by his attorney, duly authorized for that purpose; and every person indicted, shall be admitted to make any lawful proof by competent witnesses, on oath, or by other lawful testimony.²

The general authority of an attorney does not extend to the case above provided for; there must be given him before trial, a special authority and waiver.³

It is said to be a principle pervading the entire law of procedure in criminal causes, that after an indictment found, nothing shall be done in the causes in the absence of the prisoner.⁴

In felonies, the prisoner has not the power, either by himself or attorney, to waive the right to be personally present during the trial.⁵

§ 88. OF SEPARATE TRIALS BY DEFENDANTS JOINTLY INDICTED.

At the common law it was not the right of the defendant, where jointly indicted with another, to demand a separate trial, yet such favor lay in the discretion of the judge on cause being shown him, and the doctrine applied alike in cases of felony and misdemeanor.⁶ The Revised Statutes contain the following provision upon this subject:

When one or more defendants shall be jointly indicted for any felony, any one defendant requiring it shall be tried separately.

¹ 2 R. S., 735, § 16.

² 2 R. S., 735, § 15.

³ *Peo. v. Petry*, 2 Hilton, 523; *Peo. v. Wilkes*, 5 How., 105.

⁴ 1 Bish. on Cr. Pro., § 682.

⁵ *Prine v. Com.*, 6 Harris, Pa. 103-104.

⁶ 1 Bish. Cr. Pro., § 959.

In other cases, defendants jointly indicted shall be tried separately or jointly, in the discretion of the court.¹

Where two or more persons are jointly indicted for a felony, and demand separate trials, they have not a right to elect which defendant shall be tried first. The order of the trials in such case is within the control of the district attorney, subject to the direction of the court, and, as a general rule, the court should not interfere to compel the district attorney in regard to it.²

Whether defendants indicted jointly for a misdemeanor shall be allowed separate trials is in the discretion of the judge before whom the trial takes place.³

This discretion may be exercised by an order made on the motion of the district attorney, as well as on that of the prisoner's counsel. If, in the opinion of the district attorney, public justice requires a joint trial in misdemeanors, the court will not direct separate trials, except under very special circumstances. And if it seems best to consist with the advancement of justice, as if the district attorney is prepared to try one prisoner and has been unable to procure witnesses against the other defendant, and if compelled to try jointly, there is danger that the other will escape, the court may, in the exercise of its discretion, allow a separate trial on the motion of the public prosecutor.⁴

Where defendants are tried jointly, and there is a challenge for cause to a juror by one defendant, it is plain that any disqualification of the juror to serve as against one of the prisoners should require him to be rejected as to both, since in the nature of this service he could not sit for the trial of one without sitting also for the trial of the other.⁵

It also follows that if one of the prisoners challenges a juror peremptorily, and the other does not challenge him, he is equal to be removed from the panel.⁶

Where separate trials are had, no one of the persons jointly indicted can be a witness for any other one until the case is disposed of either by *nolle prosequi*, acquittal or otherwise.⁷

¹ 2 R. S., 735, § 22.

² *Peo. v. McIntyre*, 1 Park., 371; *Id.*, 9 N. Y. (5 Seld.), 38; 19 Wend., 377.

³ *Peo. v. Stockham*, 1 Park., 424; 7 Cow., 369; *Id.*, 108.

⁴ 1 Park., 424.

⁵ 1 Bish. Cr. Pro., § 966.

⁶ *Id.*; 12 Wheat., 480; 4 Mason, 159, S. C.; 6 Ohio, 86; 4 Yerg., 246.

⁷ *Peo. v. McIntyre*, 4 Park., 371.

§ 89. PROCEEDINGS WHERE PRISONER IS INSANE AT THE TRIAL.

The supreme court have said that the statute is explicit that no insane person can be tried; but it does not state in what manner the fact of insanity shall be ascertained. That is left as at common law, and, although in the discretion of the court, other modes than that of a trial by jury may be resorted to; still, in important cases, that is the most discreet and proper course to be adopted.¹

Upon the trial of a preliminary issue of this kind the clerk administers the following oath to the jury:

"You shall diligently inquire and a true verdict return in behalf of the people of the State of New York, whether A B, the prisoner at the bar, who now stands indicted for (*naming the offence*), be of sane memory or not, according to your evidence and knowledge."²

On such preliminary trial the defendant is not entitled to peremptory challenges, but challenges for cause may be made.³

The test of insanity, when set up to prevent a trial, is, whether the prisoner is mentally competent to make a rational defence, and when alleged as a defence to an indictment, it is whether, at the time of committing the act, he was laboring under such mental disease as not to know the nature and quality of the act he was doing or that it was wrong.⁴

There is, however, another statute which⁵ provides, that if any person in confinement under indictment, or under sentence of imprisonment, or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or in consequence of any summary conviction, or by order of any justice, or under any other than civil process, shall appear to be insane, the county judge of the county where he is confined shall institute a careful investigation, call two respectable physicians and other credible witnesses, invite the district attorney to aid in the examination, and, if he deem it necessary, call a jury, and for that purpose is fully empowered to compel

¹ *Freeman v. Peo.*, 4 Den., 20; *Steph. Cr. L.*, 3, 4, 280-334. 1 *Hale P. O.*, 34, 35; 4 *Blac. Com.*, 395, 396; 1 *Russ. on Cr.*, p. 14; *Shelf on Lunacy*, 467, 468; *Stock on Non-Com.*, 35, 36; 2 *R. S.*, 698, § 2; 3 *Robinson's Prac.*, 115; 1 *Mass.*, 102.

² 13 *Mass. R.*, 299.

³ 4 *Den.*, 9.

⁴ *Id.*

the attendance of witnesses and jurors; and, if it be satisfactorily proved that he is insane, said judge may discharge him from imprisonment and order his safe custody and removal to the asylum, where he shall remain until restored to his right mind; and then, if the said judge shall have so directed, the superintendent shall inform the said judge and the county clerk and district attorney thereof, so that the person so confined may, within sixty days thereafter, be remanded to prison, and criminal proceedings be resumed, or otherwise discharged; or, if the period of his imprisonment shall have expired, he shall be discharged.¹

§ 90. THE RIGHT OF TRIAL BY JURY.

The statute declares that issues of fact upon indictment are to be tried by a jury,² and the Constitution of the State further provides that the trial by jury, in all cases in which has been heretofore used, shall remain inviolate forever.³

Such trial shall be had by jurors drawn, summoned and returned in the manner prescribed by law, and where any court of oyer and terminer shall be held at the same time with any circuit court, the jurors returned for such circuit court shall be the jurors for such oyer and terminer, and the jurors returned for any county court shall be the jurors for the court of sessions appointed to be held at the same time.⁴

Under the Revised Statutes no venire is necessary in criminal cases.⁵

At the common law the petit jury should consist precisely of twelve, and is never to be either more or less, and this fact it is necessary to insert upon the record.⁶

And by our statute it is provided that the first twelve persons who shall appear as their names are drawn and called, and shall be approved as indifferent between the parties, shall be sworn and shall constitute the jury.⁷

In calling a jury, where the name of a juror is called and he

¹ 2d vol. R. S., 5 ed., p. 893, § 49, as modified by Laws 1847, ch. 280, § 29.

² 2 R. S., 733, § 1.

³ Const., art. 1, sec. 2; *Wynehamer v. Peo.*, 13 N. Y., 378.

⁴ 2 R. S., 733, § 2.

⁵ *Peo. v. Ferris*, 1 Abb., 193.

⁶ 1 Chit. Cr. L., 505; 2 Wm. Black., 719; 2 Hale P. C., 296; Cro. Eliz. 654;

³ Serg. & Rawle, 237; 7 Abb. Pr. R., 271.

⁷ 2 R. S., 420, § 128.

does not answer, his name is to be returned to the box with the undrawn ballots, and if he then returns into court, neither party can require him to take his seat as a juror.¹

A trial by jury cannot be waived in criminal cases, and a conviction by a verdict of eleven jurors is illegal, although the prisoner requested and consented, and the prosecuting officer consented, in the progress of the trial, that one of the original panel of twelve jurors be withdrawn, and that the trial proceed with eleven.²

§ 91. OF THE RETURN AND SUMMONING OF JURORS.

The method of the selection and summoning of petit jurors is pointed out by the Revised Statutes. In the city of New York and the county of Kings, the jurors are selected by an officer known as the commissioner of jurors.³

In other counties of the State they are selected by the supervisor, town clerk and assessors of the several towns.⁴ In such cases duplicate lists of the persons selected are transmitted to the county clerk and filed with the town clerk.⁵ And in the city of New York and county of Kings, lists of the persons selected are also deposited in the county clerk's office. Previous to the holding of criminal courts of record, the clerk of the county in which such court is to be held is to draw the names of the persons to serve as jurors at such court, the same having been previously written upon ballots and deposited in a box, except in the county of Kings a majority of the judges named in the act for that county, and the commissioner of jurors, shall appoint one of their number to draw the names of the jurors from the box. The method and manner of making the drawing, the number of persons to be drawn, the officers who are to be present, the making and certifying of the names drawn, and the summoning of such persons by the sheriff, are all provided for by statutory enactment.⁶

The county judge, at the time of drawing grand or petit jurors

¹ *Peo. v. Larned*, 3 Selden, 445.

² *Peo. v. Cancemi*, 7 Abb., 271.

³ *Laws* 1858, ch. 322; *Laws* 1847, ch. 495.

⁴ 2 R. S., 411, § 4.

⁵ *Id.*

⁶ *Vide* 5th ed., R. S., vol. 3, p. 695; *Laws* 1847, ch. 495, p. 734; *Laws* 1858, ch. 322, p. 517; *Laws* 1861, ch. 210, amended 1867, ch. 494, vol. 1, p. 1282.

for any county court or court of sessions, may designate any day during the term that he may deem expedient, on which the petit jurors shall attend for the trial of any issue of fact, and the sheriff shall summon such jurors on the day designated.¹

§ 92. OF THE QUALIFICATIONS OF JURORS, AND DISCHARGING AND EXCUSING THEM FROM JURY DUTY.

The qualifications of the jurors are fixed by the Revised Statutes of the State.²

They must be:

1. Male inhabitants of the town from whence selected not exempt from serving on juries.

2. Of the age of twenty-one years or upwards and under sixty years old.

3. They must be assessed, for personal property belonging to them in their own own right, to the amount of two hundred and fifty dollars, or shall have a freehold estate in real property in the county belonging to them, in their own right or in the right of their wives, to the value of one hundred and fifty dollars.³

In certain counties of the State, viz : Niagara, Erie, Chautauqua, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, Steuben, and Franklin, persons holding an interest in a contract for the purchase of land, under which improvements have been made to the value of one hundred and fifty dollars, and who shall own such improvements, and who have been assessed on the last assessment roll of the town for such land in their possession, have a sufficient property qualification.⁴

So also persons residing on the New Stockbridge tract, in the towns of Vernon and Augusta in the county of Oneida, and Lennox and Smithfield in the county of Madison, who shall be in the possession of lands under a contract for the purchase thereof, and shall be worth one hundred and fifty dollars in personal property, or shall have made improvements upon lands to that amount, are deemed to possess property qualifications to serve as jurors in any court holden before a justice of the peace in the town.⁵

¹ Laws 1861, ch. 8, p. 14.

² 2 R. S., 412, § 5.

³ Id.

⁴ 2 R. S., 412, § 6.

⁵ Id., 7.

.In the city of New York it is not necessary, as a qualification for a juror that he should be actually assessed in said city; but all persons residing in said city, who shall be qualified to serve as jurors and not exempted by any of the laws of this State, shall be selected as such whether they have been assessed or not.¹

4. They must be in the possession of their natural faculties, and not infirm or decrepid.

5. And free from all legal exceptions, of fair character, of approved integrity, of sound judgment, and well informed.²

Aliens are also incapable of serving upon juries.³

County of Kings.—In the county of Kings it is declared that, in addition to the above qualifications of jurors, that the assessor and commissioner of jurors in that county shall not select as jurors the persons named in the act appointing such commissioner as exempt from the performance of jury duty.

The act above referred to, in relation to the county of Kings, provides that every person shall be exempt from serving on a jury when it shall satisfactorily appear:

1. That such person is not at the time the owner in his own right, or in the right of his wife, of real property of the value of one hundred and fifty dollars, or of personal property of the value of two hundred and fifty dollars.⁴

2. That such person is under the age of twenty-one years, or over sixty years of age, or is not in the possession of his natural faculties, or that there is any legal exception against him.

3. That such person is a minister of the gospel, and officiating as such, and not regularly engaged in any other business, avocation or calling.

4. That such person is a regular practising physician or surgeon, and has patients requiring his daily attention as a practitioner of medicine, and is not regularly engaged in other business.

5. That such person is a member of the bar of the Supreme Court of this State in actual practice, having causes in court, and is not regularly engaged in any other avocation.

6. That such person is a justice of the peace, or holds any other

¹ Laws 1847, ch. 495, § 1.

² 2 R. S., 412, § 5.

³ 2 R. S., 721, § 29.

⁴ 2 R. S., 412, § 52.

nil office under the United States, State, county or city, the duties of which are at the time inconsistent with his attendance as juror.

7. That such person is actually engaged as a professor or teacher in any college, academy or public school, or in any private school for the instruction of pupils in the usual branches of education.

8. That such person is a pilot, duly licensed in pursuance of any law of this State, and at the time is in actual discharge of his duties as such.

9. That such person has faithfully served in any duly organized fire department or company in this State for the period prescribed by law, to entitle him to exemption from jury duty, or is at the time a member of any company of firemen duly organized according to law, and faithfully performing all the duty of a fireman therein, the evidence of which shall be the certificate thereto of the foreman or other chief officer of such company, duly verified by his oath, and dated within three months of its presentation, when it relates to service not already completed.

10. That such person is an officer, non-commissioned officer or private, in any brigade, regiment, battalion, company or troop in said county of Kings, duly uniformed and equipped according to law, and faithfully performing all the duty of a soldier therein, by making the parades and attending the drills, inspections and reviews required by law, or who shall have done so for the period prescribed by law to entitle him to exemption from jury duty. The evidence of such exemption to be the certificate of the commandant of such brigade, regiment, battalion, company or troop, duly verified by his oath, dated within three months of the time of presentation, when relating to service not already completed; such certificate to be filed with the commissioner of jurors for that county.

11. That such person is an alien.

12. That such person does not himself reside in the county of Kings, or that he is mentally or physically incapable of performing jury duty.

13. That such person belongs to the army or navy of the United States, or to the police force of the city of Brooklyn or of the police district.¹

¹ Laws 1858, ch. 322, § 10.

It is also further provided by statute, that persons of any religious denomination, whose opinions are such as to preclude them from finding any defendant guilty of an offence punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for any offence punishable with death.¹

It is not the opinions upon this subject of the religious denomination to which juror belongs, which excludes him, but his own opinions; and therefore, if he entertains opinions which are such as to preclude from finding a defendant guilty of an offence punishable with death, he is incompetent as a juror, though he does not belong to a religious denomination.²

Also, no person who was a member of the grand jury or inquest, by which any indictment shall be found, shall serve as a petit juror for the trial of such indictment, if he be challenged for that cause by the accused.³

Neither shall any alien be entitled to a jury of part aliens or strangers for the trial of any indictment whatever.⁴

(a) *What Jurors to be Discharged.*—The court shall discharge any person from serving on a jury in the following cases:

1. When it shall satisfactorily appear that such person is not at the time the owner in his own right or in the right of his wife of a freehold estate in real property, situated within the county, of the value of one hundred and fifty dollars, and is not the owner of personal property to the value of two hundred and fifty dollars; and in the counties hereinbefore specified,⁵ that such person is not possessed of the property qualification therein required.

2. When it shall appear that any such person is under twenty-one years of age or over sixty years of age, or that he is not in possession of any of his rational faculties.

3. When there is any legal exception against such person.⁶

4. When such person is a member of any fire company duly organized according to law.

5. When such person is in the actual employment of any glass,

¹ 2 R. S., 734, § 14.

² *Peo. v. Damon*, 13 Wend., 351.

³ 2 R. S., 734, § 8.

⁴ *Id.*, § 7.

⁵ *Ante.*

⁶ 2 R. S., 415, § 99.

cotton, linen, woolen or iron manufacturing company by the year, month or season.

6. When such person is a superintendent, engineer or collector of any canal authorized by the laws of this State, any portion of which shall be actually constructed and navigated.

7. When any such person is a minister of the gospel or teacher in any college or academy, or when such person is specially exempted by law from serving on juries.¹

Among others, the following persons are specially exempted from jury duty: All general and staff officers, all field officers, and all commissioned officers, and non-commissioned officers, musicians and privates of the military forces of this State during the time they shall perform military duty.² All operators, assistant operators, clerks and other persons, in the employ of the different telegraph companies in the State, while doing duty in the offices of said companies, or along the routes of their telegraph lines.³ Also, every collector of tolls, the clerk of each collector, not exceeding two, having the collector's certificate that they are actually employed by him; and all superintendents of repairs, lock-tenders, inspectors of boats and weigh-masters, while actually engaged in their respective employments on the canals, while the same are navigable.⁴ Also, the superintendent and each of his deputies, and all persons employed in attendance upon any works for the manufacturing of coarse salt, at the Onondaga salt springs.⁵ Also, the keepers of poor houses and alms houses.⁶ Also, persons who shall have served for five years as firemen in any of the cities or villages of this State.⁷ In the city of New York, no firemen shall be exempted from jury duty unless he actually performs all the duty of a fireman in his company; and to entitle him to such exemption, he must produce a certificate of his foreman or other chief officer of his company, that he is a faithful, and an acting member thereof. The above provisions, however, does not affect those who are exempt from

¹ 2 R. S., 415, § 99.

² Laws 1862, ch. 477, § 146; 2 R. S., 415, § 99, sub 4.

³ Laws 1861, ch. 215, p. 532.

⁴ 1 R. S., 250, § 348.

⁵ 1 R. S., 278, § 236.

⁶ 1 R. S., 631, § 95.

⁷ Laws 1848, ch. 188; 2 R. S., 412, § 7.

serving as jurors, by reason of having served as firemen, for the period required by law.¹ When the court shall have discharged the juror for any of the causes above specified, the clerk shall destroy the ballot containing the name of such juror.²

(b.) *What Jurors to be Excused.*—The court to which any person shall be returned as a juror, shall also excuse any juror from serving at such court whenever it shall appear:

1. That he is a practising physician and has patients requiring his attention.

2. That he is a surrogate or justice of the peace, or executes any other civil office, the duties of which are at the time inconsistent with his attendance as a juror.

3. That he is a teacher in any school, actually employed and serving as such.

4. When for any other reason the interests of the public or of the individual juror will be materially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court.³

In the county of Kings, the court before whom any person is summoned as a juror, may also excuse such person from serving whenever it shall satisfactorily appear:

1. That he has actually performed jury duty under the act for that county within six months next preceding the sitting of such jury, and since the second Monday in August preceding such sitting.

2. That he has actually performed duty as a grand juror since the first Monday in September next preceding the sitting of such jury.

3. That the interests of the public, or of the individual juror, will be materially injured by such attendance, or that his own health or the health of his family requires his absence from such court.⁴

When any person shall be so excused from serving, his name shall be returned to the box from which it was taken.⁵

¹ Laws 1847, ch. 495, § 13.

² 2 R. S., 415, § 100.

³ 2 R. S., 416, § 101.

⁴ Laws 1858, ch. 322, § 11.

⁵ Idem.

The petit juror desiring to be excused from the performance of jury duty, makes his application to the court, and the same oath is administered to him by the clerk as in the case of a grand juror asking to be excused.¹

§ 93. CLERK'S ADDRESS TO PRISONER BEFORE CALLING THE JURY.

The prisoner being in court before the trial commences, the clerk of the court addresses the prisoner as follows:

"A B. These good men that you shall now hear called are the jurors, who are to pass between the people of the State of New York and you (*or, if in a capital case, to pass upon your life and death*); if, therefore, you will challenge them, as they come to the book to be sworn and before they are sworn, you shall be heard."

(*The crier then calls the jurors one at a time, as they are drawn by the clerk, and when the juror comes to the stand and is ready to be sworn the clerk says*): "Juror, look upon the prisoner; prisoner, look upon the juror."

§ 94. OF CHALLENGES TO THE JURORS.

When the trial is called on, the jurors are to be sworn as they are called, unless challenged by either party.² The term challenge is used in law for an exception to the jurors who are returned to pass on a trial.³ These challenges are of two kinds: challenges to the array or to the polls, and each of these is again subdivided into principal challenges and challenges to the favor and may be taken by the people as well as by the prisoner.

In addition to the above challenges, which are designated as challenges for cause, both the prisoner and the people are also entitled by statute to certain peremptory challenges, without assigning any reason therefor, and to be made or omitted according to the pleasure, will or caprice of either party.

For the sake of convenience we shall first mention the different kinds of challenges allowed to the people and the prisoner respectively, and then discuss the several cases of challenge that may arise.

¹ Ante, page 240.

² 4 Blac. Com., 352; 3 Id., 358.

³ 1 Arch. Cr. P., § 163, note.

A challenge for principal cause, and the decision of the court upon it, forms a part of the record, and are reviewable by certiorari.¹

And a bill of exceptions will lie to review questions of law raised and decided on a challenge for favor, even though the prisoner had not exhausted the peremptory challenges when the panel was filled.²

§ 95. OF THE KINDS OF CHALLENGE ALLOWED TO THE PEOPLE.

On any trial for any offence punishable by death, or by imprisonment in the State prison for the term of ten years, or for a longer time, the people shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial, and no more; and on the trial of an indictment for an offence punishable by imprisonment for a term less than ten years, the people shall be entitled peremptorily to challenge three of the persons drawn as jurors for such trial, and no more.³

It is also provided by statute that nothing in the above provision shall be deemed to prevent any challenges allowed prior to the passage of the same, either to the array of jurors or to the individual jurors.⁴

The attorney general or district attorney, prosecuting for the people of this State, shall also be entitled to the same challenges in behalf of this State, either to the array or to individual jurors, as are allowed to parties in civil cases; and the same proceedings shall be had thereon as in civil actions.⁵

It will be observed that the foregoing provisions, in relation to peremptory challenges by the people contained in the act of 1858, are applicable only to cases where the offence is punishable by imprisonment; but upon the trial of misdemeanors, where the punishment may be other than such imprisonment, it would seem that the people have still the right to peremptorily challenge two of the jurors, thus:

Upon an indictment for a nuisance, the district attorney claimed the right peremptorily to challenge two of the jurors,

¹ Freeman v. Peo., 4 Den., 9; 6 Cow., 555; 7 Cow., 108; 4 Wend., 229.

² Peo. v. Bodine, 1 Den., 281.

³ Laws 1858, ch. 332, § 1.

⁴ Id., § 2.

⁵ 2 R. S., 734, § 13.

and the court held that, by virtue of the act of April 27, 1847, and the provisions of the Revised Statutes, the people were entitled to the same number of peremptory challenges that are allowed to parties in civil actions.¹

§ 96. OF THE KINDS OF CHALLENGE ALLOWED TO THE PRISONER.

Every person arraigned and put on his trial for any offence punishable with death, or with imprisonment in a State prison ten years, or any longer time, shall be entitled peremptorily to challenge twenty of the persons drawn as jurors for such trial, and no more.²

On a preliminary trial of a question of present insanity, it has been held that the defendant is not entitled to peremptory challenges, but that challenges for cause may be made.³

Every person arraigned and put on trial for any offence not punishable with death, or with imprisonment in a State prison ten years, or for a longer time, shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial, and no more, except that in cases tried in any court of special sessions such right of peremptory challenge shall extend to only two of said persons so drawn.⁴

Every person indicted for any offence shall also be entitled to the same challenges as are allowed in civil cases, either to the array of jurors or to individual jurors.⁵

And it is further provided by statute that the provision of the statute giving the prisoner the right of peremptory challenge in the cases above stated, shall not be deemed to prevent any challenge theretofore allowed, either to the array or to individual jurors.⁶

If an offence may be punished by imprisonment in the State prison for ten years, the prisoner is entitled to the peremptory challenge given by the statute in such case; it makes no difference that a less punishment may be imposed in the discretion of the court.⁷

¹ Turnpike v. The Peo., 9 Barb., 161. ² 2 R. S., 734, § 9.

³ Freeman v. Peo., 4 Den., 21.

⁴ 2 R. S., 734, § 10; Laws 1847, ch. 134, § 2.

⁵ 2 R. S., 734, § 12.

⁶ Laws 1847, ch. 134, § 3; 2 R. S., 734, § 11.

⁷ Duel v. The Peo., 4 Den., 91.

It has been said that where several defendants are jointly indicted and tried, each of them is entitled to the number of peremptory challenges allowed by law, and a challenge by one excludes the juror challenged as to all.¹

But in this State it has been held that, where two or more persons jointly indicted for murder are tried together, only twenty peremptory challenges can be allowed to all the defendants.²

§ 97. OF CHALLENGES TO THE ARRAY.

By a challenge to the array is meant an objection to all the jurors; not for any defect in them, but for some partiality or default in the officer who selected or arrayed the panel.³ This challenge lies as well for a partiality or default in the clerk of the court as in the sheriff or his under officer.⁴

As before stated, this challenge is either a principal challenge or a challenge to the favor.⁵

The grounds of principal challenge are such as the following: Although there may be no personal objection against the sheriff, yet that he has arrayed the panel at the nomination or under the direction of either party;⁶ that the officer who makes the array is of kindred or affinity to either party within the ninth degree;⁷ that the officer is under the distress of either party; that the officer is counsel, attorney, officer or servant of either party;⁸ that the clerk, instead of drawing thirty-six, drew seventy-two names—put them in a list and selected thirty-six from them.⁹

A challenge to the array will not be allowed on the ground that all persons of a particular fraternity have been excluded from the jury, if those who are returned possess the necessary qualifications.¹⁰ Neither is it a good ground of challenge to the array, that the jury was drawn and the panel certified by the

¹ 12 Wheat., 480; 6 Ohio, 86; 4 Mason, 159; 2 Yerger, 246.

² *Peo. v. Thayer*, 1 Park., 395.

³ 3 Blac. Com., 359; 2 Tidd, 779.

⁴ *Gardner v. Turner*, 9 Johns., 260.

⁵ Ante.

⁶ 3 Blac. Com., 359.

⁷ 1 South. Rep., 364.

⁸ Cowp., 112.

⁹ 9 John., 260. For other causes of challenge see Bac. Abr., tit. Juries, E, and cases there cited; also Graham's Practice, 2d ed., 301, 2.

¹⁰ *Peo. v. Jewett*, 3 Wend., 314.

deputy clerk instead of the clerk, who was absent.¹ It is good ground for challenge to the array, that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court at their request, without any order having been entered requiring such jurors to serve.²

The causes of challenge to the array for favor are such as imply at least a probability of bias or partiality in the officer, but do not amount to a principal challenge. Thus, that the party is a tenant of the officer, or that the son of the officer has married the daughter of the party, or the like;³ that the officer and the party are fellow servants,⁴ or the party servant to the officer, and so from any cause which the triers may find that he is not entirely indifferent between the parties.⁵

§ 98. OF CHALLENGES TO THE POLLS.

A challenge to the polls is an exception to one or more jurors who have appeared, individually, and this is either a principal challenge or a challenge to the favor. Where the matter charged against one who is drawn as a juror is in judgment of law a disqualification, the challenge is for principal cause, and is entered on the record. When the objection is not *per se* a disqualification, the challenge is for favor and is made on terms. In the former case, where the facts are ascertained, it is to be determined by the court, in the latter the question is one of fact to be determined by the court.⁷

A matter which merely exempts a man from serving on a jury and does not incapacitate, is not a cause of challenge.⁸

A challenge to the polls for principal cause to be effective must be on account of some matter of fact which, if admitted, proved necessarily and conclusively, disqualifies the juror.⁹

Challenges to the polls other than peremptory challenges, are divided by the older writers into four classes, viz.: *Propter hoc*:

¹ *Peo. v. Fuller*, 2 Park., 16.

² *McCloskey v. The Peo.*, 5 Park., 308.

³ *Co. Litt.*, 156.

⁴ *Dyer*, 367, pl. 140.

⁵ *Cro. Eliz.*, 581.

⁶ *Cow. Trea.*, 3d ed., vol. 2, p. 344.

⁷ *Peo. v. Bodine*, 1 Denio, 281.

⁸ *Gra. Prac.*, 2d ed., 303.

⁹ *Peo. v. Stout*, 4 Park., 109.

ris respectum, propter defectum, propter affectum and *propter delictum*;¹ and of these, the first, second and the last, appear to be principal challenges, while the third consists of both principal challenges and challenges to the favor.² A better classification of all challenges to the polls, would seem to be first into challenges for principal cause which, if found true, standeth sufficient for itself, without leaving anything to the conscience or discretion of the triers. Second challenges concluding, to the favor when either party cannot take any principal cause, but sheweth cause of favor which must be left to the conscience and discretion of the triers, to find the juror favorable or not favorable, and third peremptory without any cause assigned.³ We have already considered the cases in which peremptory challenges may be taken, and shall now proceed to an examination of challenges to the polls, both as to principal challenges, and to the favor, following however the classification as laid down by the older writers, viz.:

1. *Propter Honoris Respectum*.—This cause of challenge has no application with us as depending upon a title of nobility.⁴

2. *Propter Defectum*.—On account of some defect in the juror's qualifications to set upon a jury.

Among the grounds constituting this ground of challenge may be stated the following:

(a) *Alienage*.—BLACKSTONE says, if a man be an alien born, this is a defect of birth,⁵ and this was a good cause of challenge at the common law.

(b) *Property Qualification*.—The statute provides that the jurors should be assessed for personal property belonging to them in their own right, to the amount of two hundred and fifty dollars, or have a freehold estate in real property in the county, belonging to them in their own right or in the right of their wives, to the value of one hundred and fifty dollars.⁶

¹ 3 Blac. Com., 362; Co. Lit., 156; 2 Hawk. C., 43, § 11, *et seq.*

² Coke's Com., p. 157 a.

³ Cornell v. The Peo., 1 Park., 275.

⁴ Idem; U. S. Const., Art. 1, § 9, p. 7.

⁵ 3 Blac. Com., 362.

⁶ 2 R. S., 411, § 3.

The objection that a juror has not the requisite property qualification is lost if not raised when the jury is drawn, even though the facts do not come to the knowledge of the party until afterwards.¹

(c) *Property Qualifications in Certain Counties.*—In certain counties of the State the property qualification is below that required in other parts of the State.²

(d) *Want of Mental Capacity, &c.*—One of the statutory disqualifications of jurors is, that they shall be in the possession of their natural faculties, and not infirm or decrepit.³

One who is drunk is not a competent juror,⁴ neither is an idiotic person.⁵

(e) *Other Statutory Disqualifications.*—Members of a jury or inquest, by which any indictment shall have been returned, are disqualified from serving as a juror upon the trial of an indictment if challenged for that cause by the accused;⁶ and persons of any religious denomination, whose opinions are known to preclude them from finding any defendant guilty of an offence punishable with death, shall not be allowed to serve as jurors upon the trial of an indictment for any offence punishable with death.⁷

3. *Propter Affectum.*—Which is on account of some supposed bias or partiality, and this may be either a principal challenge to the favor.⁸ In principal challenges, the cause assigned comes with it *prima facie*, evident marks of suspicion either of bias to or favor, but in the challenge to the favor, the objection is to some probable circumstance of suspicion, or the like.⁹ As to the disqualifications arising under this subject of challenge we have found the following :

¹ *Peo. v. Jewett*, 6 Wend., 386.

² *Vide ante*.

³ 2 R. S., 411, § 4.

⁴ 27 Ga., 287.

⁵ *State v. Scott*, 1 Hawks, 24.

⁶ 2 R. S., 734, § 8.

⁷ 2 R. S., 734, § 14; 13 Wend., 351.

⁸ 3 Black. Com., 363.

⁹ *Idem*.

(a) *Bias in the Juror's Mind on the Question whether or not the Prisoner is Guilty.*—The fact that one drawn as a juror, has expressed an opinion upon the guilt of the prisoner, is a sufficient ground of challenge; the prisoner is entitled to a trial by jurors who stand indifferent; *i. e.*, neutral, free of any bias, with minds uncommitted. It is not needful to exclude a juror, that he should entertain any ill will towards the prisoner.¹

A challenge for that the juror has expressed an opinion, is a challenge for principal cause, and triable by the court.²

A juror was challenged for principal cause, and being examined under oath, testified, on his direct examination, that he had formed an opinion and expressed it; and on his cross-examination, that he had no fixed opinion which could not be removed by the evidence. The court overruled the challenge, and the juror was then challenged for favor, and on examination said: that his mind was balanced; that he did not know that he had any impression or opinion; that that had been removed by a former trial of the prisoner, when the jury were not able to agree. It was held that it was error to admit him. 1. What he said on challenge to the favor, could not be considered upon the question as to the challenge for principal cause. The finding of the triers cannot cure an error in the decision by the court of the challenge for principal cause. 2. By his statement on the first challenge, he was disqualified. The testimony should be construed with liberality to the defendant.³

Where on a trial for murder, a juror who was drawn, was challenged by the prisoner for principal cause, on the ground that he had formed and expressed an opinion, and such challenge was traversed by the public prosecutor, and it appeared by the testimony of the juror who was called upon as a witness to prove the truth of the challenge, that he thought he had an impression as to the prisoner's guilt or innocence; that he rather thought he had formed an opinion; that he presumed he had expressed it, and thought he retained it; that he had formed an opinion if the newspaper accounts of the transaction, of which he had read only a part, were true, and that so far as he read he gave them cre-

¹ *Peo. v. Vermilyea*, 7 Cow., 108.

² *Idem*; *Freeman v. The Peo.*, 4 Den., 9; 4 Wend., 229; 6 Cow., 555; 14 Serg. & R., 292; 17 Id., 155; 16 N. Y., 501.

³ *Cancemi v. Peo.*, 16 N. Y. (2 Smith), 501; 7 Abb. Pr., 271.

dence ; that it might or might not require evidence to remove his impression of the prisoner's guilt ; that he had not arrived at a definite opinion, and the court overruled the challenge and declared the juror to be competent, it was held on review, that the decision was correct,¹ for to sustain a challenge for principal cause, on the ground that the juror has formed and expressed an opinion, it must appear that the opinion was absolute, unconditional, definite and settled ; it is not enough that it was a hypothetical condition, indefinite and uncertain. If the opinion belongs to the latter class, it is a proper subject for challenge to the favor.

Where, on the trial of a challenge for favor, the person challenged as a juror testified that he had read part of the statement in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence, that he had no bias one way or the other ; that his preconceived idea or impression would in no way influence his verdict, and that he would be governed entirely by the evidence produced on the stand, he was adjudged to be a competent juror.²

On the trial of a challenge for principal cause nothing short of a fixed and settled opinion will disqualify the juror. It is proper to exclude questions tending to show a mere impression or bias.⁴ But it is otherwise when the challenge is for favor, the ground of bias.⁵

The fact that the juror has heard part of the evidence at the coroner's inquest, read and formed an impression that the prisoner was guilty, but has doubts, and would be guided by the evidence, &c., is not enough to support a challenge for principal cause.⁶

On a challenge for principal cause, grounded on the juror having expressed an opinion, it is no answer to the objection that the opinion is not based on any knowledge of facts, but on mere rumors and reports.⁷

A late writer upon criminal law remarks, that if a man learns in advance of the law, and settles in his own mind the question

¹ *Slout v. Peo.*, 4 Park., 71.

² *Idem.*

³ *Sanchez v. Peo.*, 4 Park., 535.

⁴ *Peo. v. Honeymore*, 3 Den. 121 ; *Freeman v. Peo.*, 4 Den., 9.

⁵ *Id.*

⁶ *Freeman v. The Peo.*, 4 Den., 9 ; *Peo. v. Stout*, 4 Park., 71 ; 4 Park., 5.

⁷ *Peo. v. Mather*, 4 Wend., 554.

guilt against the prisoner, whether by reason of what he has read or heard, or by reason of an inner impulse, which condemns before it hears, he is not a fit person to be a juror in the cause; for his mind, which ought to be a blank on which the evidence might write its conclusions, is already pre-occupied.¹

A challenge for principal cause is not established by merely showing that the juror had formed an opinion that the prisoner had killed the deceased, which he never expressed; this was not an opinion as to the guilt or innocence of the prisoner; he might have killed the deceased and still have been innocent of any criminal offence.²

(b) *Bias which comes from near Relationship.*—CHITTY says, if the juror is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted.³ So, also, if he has acted as godfather to a child to the party, he may be challenged for that reason.⁴ Upon this subject, the relationship by affinity is the same as by consanguinity.⁵ But affinity ceases with the dissolution by the death of one of the married parties of the marriage by which it was created.⁶

(c) *That the Juror has a Pecuniary or other Interest in the Event of the Action.*—It has been allowed a good ground of challenge on the part of the prisoner, that the juror hath a claim to the forfeiture which shall be caused by the prisoner's conviction.⁷ The members of any association of men combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for that purpose, are incompetent to sit as jurors on the trial of an indictment for violating the law.⁸

So, also, if the juror has taken money for his verdict.⁹

¹ 1 Bish. Cr. Pro., 772.

² Lowenberg v. Peo., 27 N. Y., 336.

³ 1 Chit. Cr. Law, 541; 3 Blac. Com., 363, Co. Lit., 157 a.

⁴ Co. Lit., 157 a; Burns' Jus. Jurors, IV, I.

⁵ 1 Bish. Cr. Pro., 765.

⁶ 1 Bish., Mar. & Div., § 314.

⁷ Hawk. P. C., ch. 43, § 28.

⁸ Com. v. Livermore, 8 Gray, 18.

⁹ 3 Black. Com., 363.

(d) *That the Juror has Passed upon the same Question while Serving in some other Capacity.*—If the juror has passed upon the question, though he has only discharged a duty in so doing, still, as his opinion has been once made up, he is not a fit person to hear the evidence and make up a second opinion.¹

Our statute provides that no member of the grand jury or inquest, by which any indictment shall be found, shall serve as a petit juror for the trial of such indictment, if he be challenged for that cause by the accused.²

(e) *Bias from Particular Opinions concerning the Law.*—If the juror holds the statute to be void, as being unconstitutional, and this opinion is of such a nature that he cannot convict, whatever the evidence may be, he is incompetent.³ If in general terms the juror does not favor the policy of capital punishment, he is not for this reason incompetent.⁴ But if he has such conscientious scruples as will forbid his bringing in a verdict of guilty in such case, or trying it fairly, he must be excluded.

This is sufficient ground to challenge for principal cause.⁶

Upon a challenge for favor, upon the ground of conscientious scruples, the following question was held competent before the triers, viz.: "Have you any conscientious scruples against rendering a verdict of guilty in a case where the punishment is death."⁷

Where the juror testified that he was opposed to the punishment of death, but said, that if sworn as a juror on a trial for murder and the evidence of guilt was clear he should find the accused guilty, it was held that the challenge was not sustained.⁸

On a challenge for favor, the juror testified before the triers

¹ 1 Bish. Cr. Pro., 773; 3 Black. Com., 363.

² 2 R. S., 734, § 8.

³ Com. v. Austin, 7 Gray, 51.

⁴ Com. v. Webster, 5 Cush., 295; 16 Ark. 568; 7 Cal., 140; Peo. v. Wilson, 3 Park., 199; Lowenberg v. Peo., 5 Park., 414.

⁵ 1 Bish. Cr. Pro., 779, and cases cited; 3 Park., 199; Peo. v. Damon, 13 Wend., 351.

⁶ Walter v. Peo., 3 N. Y., 147.

⁷ Lowenberg v. Peo., 5 Park., 415.

⁸ Peo. v. Wilson, 3 Park, 199.

that he had conscientious scruples in reference to serving as a juror in a case where the punishment on conviction would be death, that he would, if he took an oath to serve as a juror, render a verdict in accordance with the evidence, but that it would violate his conscience to do so, and that he could not, where the punishment was death conscientiously render a verdict which would take a man's life, even if the evidence clearly showed that the prisoner was guilty, the court refused to charge the triers that, assuming what the prisoner had sworn to to be true, no cause was shown which would justify the triers in finding the challenge true.¹

It is also provided by statute in this State that persons of any religious denomination, whose opinions are such as to preclude them from finding any defendant guilty of an offence punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for any offence punishable with death.²

(f) *Social and Civil Connections.*—CHITTY says: "If the jurymen be under the power of either party, or in his employment, or if he has eaten or drank at his expense, he may be challenged by the other."³

So, also, it was formerly said, if he be of the same society or corporation with him,⁴ but it is doubted whether such a rule now exists. Thus it has been held in this State to be no cause of challenge to a juror that he is a free-mason, where one of the parties to a suit at law was a free-mason and the other not.⁵

(g) *A General Bias Against the Prisoner.*—The causes of challenges to the polls are manifestly numerous and dependent on a variety of circumstances, for the question to be tried is whether the juror is altogether indifferent as he stands unsworn, because he may be, even unconsciously to himself, swayed to one side, and indulge his own feelings even when he thinks he is influenced entirely by the weight of evidence.⁶

¹ *Lowenberg v. Peo.*, 5 Park., 414.

² R. S., 734, § 14. Vide 1 City H. Rec., 185; 3 Id., 45.

³ 1 Chit. Cr. Law, 541; Co. Lit., 157; Bac. Abr., Juries e; Dick. Sess., 186; Tidd, 5th ed., 846.

⁴ 3 Blac. Com., 363.

⁵ *People v. Horton*, 13 Wend., 9.

⁶ 1 Chit. Cr. Law; 1 Bish. Cr. Pro., 767; Co. Lit., 157, b; Bac. Abr., Juries e; Dick. Sess., 188; Williams' Jus. Juries, V.

Upon a challenge to a juror for favor, any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence before the triers. The causes of challenge for favor are very various, and not subject to precise definition, and the question is to be submitted as a question of fact upon all the evidence, to the conscience and discretion of the triers, whether the juror is indifferent or not.¹

(4) *Propter Delictum*.—These challenges are for some crime or misdemeanor that affects the juror's credit and renders him infamous.² It is said to be a good ground of challenge to a juror that he is outlawed, or that he hath been adjudged to any corporal punishment whereby he becomes infamous, or that he hath been convicted of treason, felony, perjury or conspiracy; but it is also said that none of the above challenges are principal ones, but only to the favor, unless the record of the judgment or conviction be produced.³

§ 99. CHALLENGES, WHEN MADE.

HAWKINS says no challenge, either to the array or to the panel, can be made before a full jury have appeared.⁴ It is immaterial which party challenges first,⁵ so long as the challenge is before they are sworn.⁶ But it has been held that if it was made to appear, even after a juror was sworn, that he was totally incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given.⁷

The regular practice is to challenge the jurors as they come to the book to be sworn and before they are sworn.⁸

A juror may be challenged to favor after the same juror has been challenged for principal cause, and such challenge has been tried and overruled.⁹

¹ *Peo. v. Bodine*, 1 Den., 281.

² 3 Blac. Com., 364.

³ 2 Hawk. P. C., ch. 43, § 25.

⁴ 2 Hawk., ch. 43, § 1.

⁵ *Tr. per Pais*, 144.

⁶ 1 Arch. Cr. Pro., 163.

⁷ *Peo. v. Damon*, 13 Wend., 351.

⁸ *Idem*.

⁹ *Carnel v. The Peo.*, 1 Park. Cr., 272.

§ 100. CHALLENGES, HOW MADE.

Challenge to the Array.—The challenge to the array is made in writing, and is entered on the record, so that the party may plead or demur to it, and the cause of challenge be stated specifically.¹

Challenge to the Polls.—The challenge to individual jurors to be made verbally, whether it be a peremptory challenge for cause.²

A juror is challenged for principal cause or for favor, and of the challenge should be distinctly stated, for without the challenge is incomplete, and may be wholly disreputable to the court.³

It was subsequently held that where a challenge for principal cause had been tried and overruled, and a challenge to the juror was interposed to the favor, that the form of the challenge is sufficient, without stating specifically the grounds of challenge.⁴

So, where the prisoner's counsel demurred to a challenge for favor, on the ground that he was not indifferent to the prisoner and the people, and assigned for cause that the challenge did not specify any ground sufficient in law, the district attorney joined in the demurrer, the demurrer was not sustainable, and overruled.⁵

§ 101. CHALLENGE TO THE ARRAY, HOW DISPOSED OF.

If a demurrer is interposed to the challenge, a question of law arises which the court is to decide.⁶ If a plea is entered to the challenge, it is said to lie in the discretion of the court to direct the trial in which it shall be tried; sometimes it is said to be tried by two triers from the attorneys, and sometimes to two jurors; but that when the challenge is on the ground of the officer arraying the jury, it is best to leave it to two

¹ Cr. Pro., 165, and notes; 1 Den. 281; 1 C. & K., 235; 47 E. C.,

281; 1 Arch. Cr. Pro., 165.

² In v. Peo., 4 Den. 9.

³ In v. The Peo., 1 Park. Cr., 272.

⁴ Berg v. Peo., 5 Park., 414.

⁵ 464; Tr. per Pais, 199.

⁶ C. P.—23

of the jurymen returned; but if for favor or partiality, then two indifferent persons taken from the bystanders.¹

If the facts are admitted, but deemed insufficient, as when demurrer is interposed, the court adjudges on them, and either quashes the array or overrules the challenge.² The learning upon this subject has to be sought out of old books, and there is great difficulty in deriving from them any precise rules.³

It has been said that there is some distinction between try challenges; those that are manifest or principal challenges be tried by the court, without the appointment of any triers.⁴

The present English practice, according to Roscoe,⁵ is that triers would be appointed in all cases; but it is believed that this State challenges to the array for principal cause are, like similar challenges to the polls, to be tried by the court.⁶

If the challenge to the array be found against the party, he may yet have his challenge to the polls, but neither party shall take a challenge to the polls which they might have had to array.⁷

§ 102. CHALLENGES TO THE POLLS, HOW DISPOSED OF.

When a challenge is made to the polls, if it be a principal challenge for some apparent partiality, it is sufficient if no ground be made out to the satisfaction of the court, without further investigation.⁸

It is said that a question of fact upon a principal challenge to the absence of consent to a different mode of trial, is proper to be tried before triers appointed by the court. It is competent, however, for the parties, by consent, to waive the appointment of triers and submit to the court the question of fact for its decision, and such has become the general practice.⁹

¹ 2 Hale, 275; Dick. Sess., 189; 2 Rol. Rep., 363; 4 Blac. Com., 353, 1 Burn, J., Jurors, 4, 3; Williams, J., Juries, 5; Gardner v. Turner, 9 John 260.

² 9 John., 260.

³ Ros. Crim. Ev., 6 Am. ed., 196

⁴ Co. Lit., 156 a; Bac. Abr., tit., Juries, e, 12.

⁵ Ros. Cr. Ev., 6th Am. ed., 197.

⁶ 1 Den., 281.

⁷ Co. Lit., 156 b, 157.

⁸ Co. Lit., 157 b; Bac. Abr., Juries, e, 12; Williams, J., Juries, 5; 1 Southard, 364; 1 Leigh, 598; Peo. v. Bodine, 1 Den., 281.

⁹ Stout v. Peo., 4 Park., 132.

If the challenge, however, be of favor, it is one of fact for the decision of the triers.¹

Where a juror is challenged to the favor the triers are to decide whether he is, at the time of the trial, wholly indifferent; the inquiry is not confined to the state of the juror's mind before coming to court, but if anything has occurred in court which has produced on his mind an impression of the guilt or innocence of the prisoner, it is a sufficient reason for finding the juror indifferent between the parties.²

In challenges for principal cause there may be a demurrer admitting the fact and denying its sufficiency. Then a simple question of law is presented for the decision of the court.³

When the facts on which a challenge rests are disputed the proper case is to submit the question to triers; but if neither of the parties ask for triers to settle the issue of fact, and submit their evidence to the judge and take his determination thereon, they cannot afterwards demand that the challenge be passed upon by triers,⁴ and in such cases the decision of the court is final.⁵

When challenges for the favor are interposed, there can be no demurrer by a party intending to controvert them. The decision of the triers either way is conclusive as to the fitness or disqualification of the juror. In case of a disagreement of the triers, the challenge still remains.⁶ The usual practice in cases where triers are appointed is, where no juror has been sworn, two triers are named without restriction by the court. When one of the jurors has been sworn he acts as trier with any two other individuals selected by the court, and when two of the jurors have been sworn they are chosen, and if more, the first two. Whether a challenge can be interposed to a trier thus designated does not seem to have been decided; probably not, as challenges then might be interminable. No doubt, however, objections may be urged by either party to any one called as a trier, and in such cases the matter should be summarily investigated and decided by the

¹ *Peo. v. Bodine*, 1 Den., 281; Co. Lit., 157 b; 4 B. & A., 471; 6 Cow., 559; 1 Cow., 441; 2 Park., 232.

² *Thompson v. Peo.*, 3 Park., 467.

³ 2 Park., 230.

⁴ *Peo. v. Mather*, 4 Wend., 250; 21 Wend., 509; 4 Park., 132.

⁵ *Sanchez v. Peo.*, 22 N. Y., 147.

⁶ *Peo. v. Dewick*, 2 Park., 230.

court. In a case where the two jurors first admitted were sworn as triers and heard the evidence, the argument of counsel and the charge of the court, and, after consultation, reported that they could not agree in deciding the challenge, the court held that the challenge must be re-tried, and the court selected the third and fourth jurors to act as triers for that purpose.¹

The triers having been selected by the court, the following oath is administered to them by the clerk:

"You shall well and truly try and find whether A B, the juror challenged, stands indifferent between the people of the State of New York and the prisoner at the bar. So help you God."

The triers then take their seat in the jury box. Where the triers of a challenge for favor to a juror were sworn to find whether the juror was indifferent "upon the issue joined," that qualification being objected to, it was held that the oath was erroneous.²

When the juror is challenged for favor and triers are appointed, the juror himself may be sworn as a witness before them, to state or explain any facts which do not impeach his character or his motives, or in relation to his having formed or expressed an opinion on the guilt of the prisoner, so, also, other witnesses may be called and sworn before the triers.³

Where, upon a challenge for favor, witnesses were introduced to prove an opinion expressed by the juror, as to the guilt of the prisoner, the district attorney was allowed to examine the juror himself, to rebut the evidence.⁴

The juror thus sworn is said to be sworn on his *voir dire*. The following is the form of oath administered to a witness before the triers:

"You shall true answers make to such questions as shall be put to you, touching the challenge of A B as a juror, so help you God."

And where on a criminal trial a person is drawn as a juror, and challenged to the favor, and called as a witness in support of the challenge to prove a bias growing out of what he had

¹ 2 Hale, 175; Co. Lit., 158 a; Peo. v. Dewick, 2 Park. Cr. R., 230; Dick. Sess., 190; 4 Park., 134.

² Freeman v. The Peo., 4 Den., 9.

³ Peo. v. Fuller, 2 Park., 16; Co. Lit., 158; 1 Salk., 153; 2 Park., 579; 2 Abb. Pr. R., 256; 19 John., 115.

⁴ Peo. v. Fuller, 2 Park., 16-579; 1 Park., 302.

heard or read on the subject, it is proper, on his cross-examination, to ask him his opinion as to the character and extent of the supposed bias, and whether he thinks it would influence him after hearing the evidence.¹

And when examined as a witness for the purpose of sustaining a challenge to the favor, he will not be excused from answering whether he has any prejudice or bias against a religious sect, on the ground that such answer would disgrace him.²

The following oath is administered by the clerk to the juror, where he is sworn before the triers upon his *voir dire*:

"You do solemnly swear that you shall true answers make to such questions as shall be put to you, touching your competency to serve as a juror in this cause (or, 'touching the challenge exhibited against you'), so help you God."

The finding of the triers is, "that he stands indifferent, or (not indifferent)."

The triers are the exclusive judges of the weight to be attached to the evidence of favor, and the challenging party is not entitled to an instruction from the judge that the evidence shows that the juror is not indifferent.³

The triers are to decide whether the juror is at the time of the trial altogether indifferent; the inquiry is not confined to the state of the juror's mind before coming into court; but if anything has occurred in court which has produced on his mind an impression of the guilt of the prisoner, it is sufficient to exclude him.⁴

Where a juror was found competent upon his own answers, but after he had been sworn and taken his seat, it transpired that he had misunderstood a question put to him, and had given a wrong answer, it was held that the decision upon his competency should be vacated and the trial of the challenge resumed.⁵

It is competent in the cross-examination of the juror, to ask him his opinion as to the character and extent of his supposed bias, and whether, in his opinion, he could try the case upon the

¹ *Peo. v. Knickerbocker*, 1 Park., 302.

² *Peo. v. Christie*, 2 Park., 579.

³ *Smith v. Floyd*, 18 Barb., 522; *Peo. v. McMahon*, 2 Park., 663; 4 Den., 9-35.

⁴ *Thompson v. Peo.* 3 Park., 467.

⁵ *Peo. v. Wilson*, 3 Park., 199.

evidence without bias;¹ but the opinion of the juror is by no means conclusive unless in the negative.²

Where the juror testified that he had read something about the case, and had formed an impression that the prisoner's character was bad, it was held competent to ask him whether, as a juror, he would disregard what he had heard out of the court, and would render a verdict upon the evidence.³

Where on the trial of a challenge to the favor, improper evidence is received, and the triers find the juror indifferent, and he is then challenged peremptorily, and it appears that the prisoner had not exhausted all his peremptory challenges when the panel was completed, the prisoner cannot afterwards avail himself of exceptions taken to the admission of such improper evidence before the trial.⁴

§ 103. OF THE SUMMONING OF TALESMEN AS PETIT JURORS.

At the common law, if by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales*, as it was called, was awarded until the number of twelve was sworn.⁵

Our statute provides that when twenty-four jurors, duly drawn and summoned do not appear, or when, by reason of there being one or more jurors empaneled, or in consequence of jurors being set aside, or for any other reason, there shall not remain twenty-four ballots, containing the names of jurors then attending, the court shall order the sheriff to summon from the bystanders or from the county at large, so many persons qualified to serve as jurors, as shall be necessary to make at least twenty-four jurors, from which a jury for the trial of the indictment may be selected.⁶

The names of the persons so summoned by the sheriff, shall be written on distinct pieces of paper, and shall be rolled or folded each in the same manner as near as may be, and shall be deposited with the ballots remaining undrawn, if any there be, or in a sufficient box by themselves, if there be no undrawn ballots from which a jury shall be drawn.⁷

¹ *Peo. v. Knickerbocker*, 1 Park., 302.

² *Lohman v. Peo.*, 1 N. Y. (1 Com.), 379.

³ *Idem.*

⁴ *Peo. v. Knickerbocker*, 1 Park., 302. ⁵ 4 Blac. Com., 355.

⁶ 2 R. S., 734, § 3.

⁷ *Id.*, § 4.

The above provision of the statute has been amended by further providing that the clerk may keep a box containing the names of all persons returned as jurors who may reside in the city or town where the court is directed to be held, and that when there shall be a deficiency in the number of jurors, the court may order the sheriff, in the presence of the court, to draw from such box as many persons as shall be sufficient, and as the court shall direct. The act further provides that the court may, by the consent of the parties, order the sheriff to summon from the bystanders or from the county at large, so many persons qualified to serve as jurors, as shall be necessary to make the full panel of jurors on the trial. The provisions of the above amendment do not apply to the city and county of New York, or to the county of Kings.¹

And by subsequent legislation it is further provided that nothing in the above act is to be construed to repeal, or in any wise affect the former provisions of the statute in relation to the summoning of talesmen.²

When such a deficiency occurs in a criminal case, the number of additional persons to be summoned rests in the sound discretion of the court before which the indictment is pending.³

§ 104. SWEARING THE JURORS.

The jurors who are not challenged, or who having been challenged and tried are found indifferent, are then sworn by the clerk. In capital cases the names of the jurors are called separately by the clerk, and the following oath is administered to each of them:

"You shall well and truly try and true deliverance make between the people of the State of New York and A B, the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence, so help you God."

As each juror is named and before he is sworn, or rather before the oath or affirmation is tendered him, the challenge may be made as before mentioned.

In cases of misdemeanors the jury are sworn at once, without administering the oath separately. The oath, in the last mentioned cases, is in the following form:

¹ Laws 1861, ch. 210, p. 528.

² Laws 1867, ch. 494, vol. 1, p. 1282; 2 R. S., 420, §§ 120, 121.

³ *Peo. v. Colt*, 3 Hill, 432.

"You shall well and truly try this issue of traverse between the people of the State of New York and A B, the defendant, and a true verdict give therein, according to the evidence, so help you God."

In civil cases it is the practice to administer a general oath to the petit jurors at the opening of the court; but in criminal cases they are sworn in each case in which they are called.¹

§ 105. ORDERING WITNESSES TO WITHDRAW.

Either party, immediately after the jury are empaneled, or indeed at any time during the trial, may apply to have the witnesses for the opposite party sent out of court, and the court may make an order accordingly.²

And if the witness do not withdraw when ordered, or afterwards return into court before he is called for, and is present during the examination of some other witness, it is discretionary with the judge whether he will allow him to be examined or not.³

The strict rule of practice has been said to be that the witnesses, on the part of the prisoner, should not be in court when those on the part of the State are examined;⁴ and in this State it has been held that when, on the trial of a capital case, several witnesses are to be examined to the same point, the court may, in its discretion, require all such witnesses, except the one under examination, to leave the room during such examination.⁵

The rule has also been laid down in this State that, in cases of misdemeanors, the court, at the request of the prosecutor or defendant, will direct the witnesses not under examination to be separated from those that are.⁶

The prosecution as well as the accused may demand the exclusion of witnesses from the court room during the trial, for the purpose of questioning each in the absence of others;⁷ and the granting or denying of such motion is left to the discretion of the presiding judge, and this discretion will not be interfered

¹ Vide 6 Wend., 550.

² 1 Arch. Cr. Pr., § 167.

³ Id.; *Parker v. McWilliam*, 6 Bing., 683; *R. v. Coley*, 1 Moody & M., 329

⁴ *State v. Tellers*, 2 Halst., 220.

⁵ *Peo. v. Green*, 1 Park., 11.

⁶ *Peo. v. Duffy*, 1 Whee. Cr. Cases, 123.

⁷ *Johnson v. The State*, 14 Ga., 55.

with unless there is such a manifest departure from propriety as may result in defeating the ends of justice.¹

An attorney for the party will be excepted from the order, and where he was mentioned as one of the witnesses who had been subpoenaed, express permission was obtained for him to remain.²

Where witnesses are ordered to withdraw, each party furnishes his list of them to the sheriff, whose duty it then becomes to take charge of them, and see that they are kept out of the hearing of each other's examination, and if the order be violated he will then know it and apprise the party. If the sheriff neglects his duty, the party will not be responsible. If certain of the witnesses be not in attendance, but are coming in, the party in whose behalf they are to testify, must either put their names on the list, or at his peril see that they do not violate the order by coming into court before they are called to testify. If there be no pretence that the newly arrived witnesses were in court, and hearing any of the testimony, then it is no objection that their names were not furnished to the sheriff, and they may, notwithstanding, be sworn. Those absent, when the order to withdraw is made, cannot be embraced by it. If the party do not furnish a list to the sheriff, he is responsible that the witnesses present shall obey the order to withdraw.³

In general, when a witness has been ordered to retire from the court room, but remains in court, he will not be examined.⁴ But on the whole, it seems that although the right to exclude witnesses for willful disobedience of the order be well established, yet the judges are quite cautious of exercising the power. The reason probably is, because a party may in that way, without any fault of his own, be put in very great hazard by losing important testimony; he cannot prevent the misbehavior of the witness.⁵

The necessity for the separation of witnesses occurs more frequently in cases where an *alibi* is interposed as a defence, for the object of the separation is to afford the means of discovering discrepancies in the different accounts, which (if not true) the witnesses will give of the same transaction.

¹ Nelson v. State, 2 Swan, 237.

² Everett v. Lowdham, 5 C. & P., 91.

³ 1 Arch. Cr. Pr., § 167; note cited as Anon., 1 Hill, 254, *et seq.*

⁴ 24 Miss., 602; 18 Ohio, 99; 6 Bing., 683.

⁵ 1 Arch. Cr. Pr., § 167, note; 4 C. & P., 585; 3 Murph., 487-490-493; 4 Moore & Payne, 483; 1 M. & M., 329.

is omitted it cannot be done in reply. No new question can be put in reply unconnected with the subject of the cross-examination, and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination in chief the usual course is to suggest the question to the court, which will exercise its discretion in putting it to the witness.¹ The general rule is adhered to with great strictness in criminal cases.

When the examination is closed and the witness dismissed from the stand, it is a matter resting in the discretion of the court which receives the testimony to allow of a further examination.³

The same general rules, in relation to leading questions, improper evidence, &c., which are applicable in civil action govern also criminal trials, and the witness has also the privilege of refusing to answer if he will thereby criminate himself, subject him to a penalty, or have a tendency to degrade his moral character;⁴ but it is the witness's privilege, and not the right of the party against whom he is called, to object to his giving evidence to criminate himself, and the court need not, upon the objection of such party and independently of any objection of the witness, inform the latter of the rule of law that he is not obliged to criminate himself;⁵ and if the witness waives his privilege, and testifies to a part of a transaction in which he was criminally concerned, he is obliged to state the whole.⁶

It is for the court to determine whether a direct answer to a question has a tendency to criminate a witness.⁷

Before the witness is sworn upon trials for felony the following oath is administered to him by the clerk:

"The evidence you shall give between the people of the State of New York and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth, so help you God."

Upon the trial for a misdemeanor the following oath is administered to the witness:

¹ 1 Stark. Ev., 150.

² Rex v. Stimpson, 2 C. & P., 415; Rex v. Belgeby, 4 C. & P., 218; 2 Russ., 621.

³ Peo. v. Mather, 4 Wend., 250.

⁴ Ward v. Peo., 3 Hill, 395; 19 Wend., 569.

⁵ Com. v. Shaw, 4 Cush, 594.

⁶ State v. Foster, 3 Foster (N. H.), 348.

⁷ Peo. v. Mather, 4 Wend., 231; Thatch. Cr. Cases, 146.

"The evidence you shall give in this issue of traverse between the people of the State of New York and A B, the defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God."

§ 110. DISCHARGING ONE OF SEVERAL DEFENDANTS.

Whenever two or more persons shall be included in the same indictment, and it shall appear that there is not sufficient evidence to put any defendant on his defence, it shall be the duty of the court to order such defendant to be discharged from such indictment before the evidence shall be deemed to be closed.¹

§ 111. OF THE OPENING OF THE CASE BY THE DEFENCE, AND THE WITNESSES FOR THE PRISONER AND OF WITNESSES IN REPLY.

After the district attorney has closed his examination of the witnesses for the people and rested his case, as it is called, the counsel for the prisoner usually addresses the jury, stating briefly the facts constituting his defence; he then calls and examines his witnesses in support of the defence, and the same general rules in relation to evidence, leading and improper questions, &c., are applicable, as upon the trial of civil actions.

If the defendant set up any defence, and call witnesses to prove it, the prosecutor may then give evidence in reply. This evidence must be strictly confined to the defence; the prosecutor will not be allowed to wander from that, even for the purpose of giving evidence on the original charge.²

Opening the case for new testimony on a trial for murder, after both parties have closed, rests in the discretion of the court.³

§ 112. THE ADDRESSES TO THE JURY BY THE COUNSEL.

After the evidence has been all introduced by the respective parties, the counsel for the prosecution and for the defendant may, by agreement, submit the cause to the jury for their deliberation and verdict, without argument, or they may address the jury at length in such observations and arguments as may have a bearing upon the cause on trial. These addresses to the jury

¹ 2 R. S., 735, § 21.

² 1 Arch. Cr. Pr., § 170.

³ Stephens v. Peo., 4 Park., 396; Kalle v. Peo., Id., 591.

are commonly called the summing up of the case, although that term in England is applied to what is known here as the judge's charge to the jury.¹

Where the jury are addressed, the counsel for the defendant, when he has called and examined all his witnesses, proceeds to address the jury. Where there are several defendants and they are separately defended, the order in which the counsel for the defence are to address the jury, is not very clearly settled; but it has been said that if the counsel cannot agree among themselves as to the course to be adopted, it is for the court to call them in the order in which the prisoners are named in the indictment.²

Whenever any witnesses are called for the defence, or any documents put in on behalf of the defendant at any time in the course of the trial, the counsel for the prosecution will have a right at the conclusion of the defence to address the jury in reply, and this is so, though the evidence brought for the defence be only as to character.³

The limits within which counsel are to be restrained in argument, are matter of discretion, and the ruling of the judge on that subject, cannot be reviewed on exceptions.⁴

§ 113. OF THE ADJOURNMENT OF COURT DURING THE TRIAL.

If the trial cannot be concluded in one day the court will adjourn it to the next day, or if that happen to be Sunday, until the trial is completed.⁵ The Revised Statutes declare that no court shall be open for the transaction of any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury, and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been submitted to a jury.⁶

The court may also adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court.⁷

¹ 1 Arch. Cr. Pr., § 171.

² R. v. Barber, 1 C. & K., 434; 47 E. C. L. R.

³ Ros. Cr. Ev., 6 Am. Ed., 202; 34 E. C. L. R.; 8 C. & P., 20; 1 Arch. Cr. Pr., 170.

⁴ Peo. v. Finnegan, 1 Park., 152.

⁵ 1 Arch. Cr. Pr., § 170.

⁶ R. S., 275, § 16.

⁷ 4 Blac. Com., 361; 3 St. Tr., 731; 4 Id., 231, 455-485.

At the adjournment of court the crier makes the following proclamation:

"Hear ye, hear ye, hear ye! All manner of persons who have any further business to do at this court of oyer and terminer (*or* court of sessions), may depart hence and appear here again to-morrow morning at — o'clock, to which time this court is adjourned."

At the re-assembling of the court, at the adjourned hour, the crier re-opens the court by the following proclamation:

"Hear ye, hear ye! All manner of persons who have been adjourned over to this hour, and have any further business to do at this court of oyer and terminer (*or* court of sessions), may draw near and give their attendance and they shall be heard."

Where an adjournment of the court is had, in cases where the jury is kept together and not allowed to separate, they are placed in the custody of an officer, to whom the clerk administers the following oath:

"You shall retire with the jury to some convenient room to be furnished by the sheriff; you shall not suffer any person to speak to them, nor speak to them yourself in relation to this trial, and return with them at the order of the court, so help you God."

§ 114. OF THE SEPARATION OF THE JURY DURING THE TRIAL.

Upon the trial of misdemeanors it is within the discretion of the presiding judge to permit the jury to separate and disperse at the adjournment of the court.¹ In such cases, however, the judge ought to caution the jury against holding conversation with any person respecting the cause, or suffering it in their presence, or reading newspaper reports or comments regarding it or the like.² As regards their separation upon trials for felony the rule is different. The Supreme Court at general term held that, in criminal cases of a higher grade than misdemeanors, and especially in capital cases, a separation of the jury, with or without the leave of the court for however short a time, will be fatal to a verdict against the prisoner, unless it is shown affirma-

¹ *Rex v. Wolf*, 1 Chit., 401; *Rex v. Kinnear*, 2 B. & Ald., 462; *Eastwood v. Peo.*, 3 Park., 25.

² 1 Bish. Cr. Pro., § 825; 5 Casey, 323, 327; *Stephens v. The Peo.*, 19 N. Y., 555.

tively, on the part of the prosecution by the clearest evidence and beyond a reasonable doubt, that no injury to the prisoner could have occurred in consequence of the separation.¹

In the case cited above, which was a capital case, after the testimony was closed, several of the members of the jury, while walking out for exercise, by leave of the court, and in the charge of an officer, visited and examined the place where the homicide occurred, and in regard to which the witnesses had testified, and it was held to be a sufficient reason for granting a new trial.²

The Court of Appeals, however, have held that it is not error in law in a capital trial for the judge, with the assent of the prisoner, to permit the jury to separate from time to time before the charge is given them and they return to deliberate upon the verdict.³

§ 115. THE JUDGE'S CHARGE TO THE JURY.

After the counsel have concluded their addresses to the jury, or the cause has been submitted to the jury without argument from the counsel, the presiding judge addresses the jury. He usually first states the substance of the charge against the prisoner; then, if necessary, explains the law upon the subject; he next reads the evidence or the substance of it, which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given upon the part of the defendant, and usually concludes by telling the jury that, if upon considering the whole of the evidence, they entertain a fair and reasonable doubt of the guilt of the prisoner they should give the prisoner the benefit of that doubt, and acquit him.⁴

The counsel of either party may request the judge to instruct the jury upon a question of law fairly arising in the case.⁵ But courts are under no obligation to listen to abstract proposition

¹ Eastwood v. Peo., 3 Park., 48.

² Id.

³ Stevens v. The Peo., 19 N. Y., (5 Smith) 549.

⁴ 1 Arch. Cr. Pr., § 171.

⁵ Safford v. Peo., 4 Park., 480; 5 Wend., 289; 3 Barb., 548; 1 Burr. Pr. 456.

from counsel, and are not bound to explain them upon the trial of causes. It is enough that they should respond to objections made by either party to the admission of evidence upon the trial, and give in charge to the jury the law which, under a given state of facts, governs the case.¹

In practice, the requests to the judge to charge the jury are in general reduced to writing by the counsel making the request, and the judge either charges as requested, or declines, or may charge according to his view of the law in the case. The refusal of a judge to charge as requested, is the ground of an exception as well as any part of his charge to the jury.

Where a request to charge contains two propositions, one of which is right and the other wrong, it is not error in the court to refuse to charge as requested.²

It is no doubt the duty of the judge to charge the jury, and state to them the law of the case; but there may be good reasons for omitting to do so. Thus, where there was no dispute about the law, and the facts and intent were for the jury to decide, and the trial closed so late on Saturday night, that had the jury been charged, they must either have been dismissed or kept over Sunday, it was held that the judge had a right to exercise his discretion and submit the case without a charge.³

It is error for a judge to charge the jury that the evidence of the prisoner's good character is entitled to far inferior weight, when the question is one of great and atrocious criminality, than upon accusations of a lower grade.⁴ It is not improper for the judge to call the attention of the jury to the fact that witness' testimony differs from his statements to others as proven;⁵ and where the defence relied upon is an *alibi*, as to which there is conflicting testimony, it is not error for the judge to state that it is a defence not unfrequently sustained by perjury;⁶ nor is it erroneous to remind the jury of their obligations towards the public as well as the prisoner.⁷ Nor will a conviction be reversed on a writ of

¹ *Peo. v. Cunningham*, 1 Den., 536.

² *Tomlinson v. Peo.*, 5 Park., 313.

³ *Peo. v. Gray*, 5 Wend. 289.

⁴ *Cancemi v. The Peo.*, 16 N. Y., 501.

⁵ *Peo. v. Genung*, 11 Wend., 18.

⁶ *Peo. v. Larned*, 7 N. Y. (3 Seld.), 445.

⁷ *Idem.*

error, for a mere expression of the opinion of the presiding judge upon the weight of the evidence, where the question was left to the jury.¹ A charge advising the jury that, as the prisoner gave no evidence that her character was good, that they were authorized to draw an inference that it was positively bad, is error.² So, also, that the absence of evidence of good character might be taken into account in weighing the circumstances of the case.³ Where there was some proof that the prisoner was at the scene of the crime, it was held that a charge that, "if she might have been there, the onus was cast upon her to get rid of the suspicion thus attached to her, by showing where she was," was erroneous.⁴ A verdict is not affected by an intimation given or opinion expressed by the judge as to the guilt or innocence of the prisoner.⁵ Sometimes it may be the duty of the judge to give an intimation but if he leaves fully and fairly the whole question to the jury, it is not error.⁶ As to the proper terms of a charge to the jury in a case of homicide: *Vide* *Peo. v. Walters*, 32 New York, 142; S. C. 18, Abb., 147; and as to charges in cases of alleged poisoning: *Vide* *Peo. v. Hartung*, 4 Park., 256; *Stevens v. Peo.*, 12 396.

The earlier cases held that it was not improper to charge the jury that they were judges of both the law and the fact;⁷ and in the Supreme Court the opinions were conflicting;⁸ but the courts of appeals have held that in criminal cases they are bound, by the instructions of the court as to the law, to the same extent as in civil cases.⁹

Lord HALE, in his history of the common law, in treating of the duties of judges and jurors, lays it down as a rule that the judge who presides shall always direct the jury in matters of law before they retire or withdraw, and also assist them as to matters of fact.¹⁰

¹ *Peo. v. Rothbune*, 21 Wend., 509; *Peo. v. Quin*, 1 Park., 340; 12 Wend 78; 14 Id., 111.

² *Peo. v. Bodine*, 1 Den., 281.

³ *Ackley v. Peo.* 9 Barb., 609; 1 Den., 314.

⁴ *Peo. v. Bodine*, 1 Den., 281.

⁵ *Done v. Peo.*, 5 Park., 364; *Jefferds v. Peo.*, Id., 522; Id., 234.

⁶ *Nook's Case*, 3 City Hall Rec., 13-24.

⁷ 1 Park., 147, 595-603, 474; 2 Barb., 566.

⁸ *Duffy v. Peo.*, 26 N. Y., 538.

⁹ *Hale's Hist. Com. Law.*, 256, 257.

The first duty of the judge is the most rigid impartiality. He is not at liberty to comment upon the testimony on one side and leave that on the other untouched. It is his duty to review the whole evidence, and to discuss both branches of the evidence alike. The State has rights as well as the prisoner, and partiality, therefore, of the court towards the latter ought not to be tolerated.¹

Chancellor WALWORTH said: In summing up a cause to the jury, even in a capital case, the judge has no right to point out to the jurors the strong points in the prisoner's defence only, and the weak points in the case made by the people. It is his duty to hold the scales of justice equally balanced between the people and the prisoner, and to point out to the jury impartially the strong and the weak points in the case of each, whether arising from evidence given, or from the want of evidence given by either, if any such evidence existed.²

But the judge should not dictate to the jury the verdict they should render, by his opinion to the jury on a matter of fact, rather as a direction than a mere opinion. The expression by the judge of an opinion upon the evidence, however strong or decided, has been held not to be objectionable, where it is given merely as his opinion, and the jury notwithstanding it, are at full liberty to entertain their own views, and to decide accordingly.³

The rule with regard to the positive instruction of the court to find facts, admits of the qualification that where the verdict is in strict accordance with the weight of evidence, and justice has consequently been done, a new trial will not be granted though the direction be positive. But to warrant an unqualified direction to find, the evidence must be either undisputed, or the preponderance so decided, that a verdict against it would be set aside.⁴

§ 116. THE DELIBERATIONS OF THE JURY.

BISHOP says, the several questions which arise under this subject, are, with the exception of the one which concerns the form of the verdict, attended with some uncertainty, and conflict of

¹ 3 G. & W. on new trials, pp. 718, 719.

² *Peo. v. White*, 24 Wend., 520.

³ 3 G. & W. on New Trials, 738 *et seq.*; *Id.*, 726; *Com. v. Childs*, 10 Pick., 252.

⁴ G. & W. on New Trials, 738, 763.

judicial decision and practice, and that the English and American law relating to them differs somewhat, as well as the ancient and modern differs.¹ After the evidence is closed, and has been summed up by the respective counsel, and the court have charged the jury, they may either give their verdict without leaving the box, or in cases of doubt they retire in charge of an officer to deliberate. After they have retired, it is their duty to continue together until they return into court, without having any communication with any person, either on the subject of the case or on any other.²

The jury, after the evidence is submitted to them, cannot receive any kind of evidence which can have the most remote bearing upon the case; it will be fatal to their verdict.³

The jury have no right to found a verdict upon chance; as, nine of the panel should agree the other three should fall in with them, but the jurymen themselves cannot be heard to disavow their own verdict.⁴

There have been several conflicting decisions in this State as to whether juries in criminal cases were judges of the law as well as the fact, but the Court of Appeals have decided that the jury in their deliberations are to be governed by the instructions of the court upon legal questions, in criminal as well as in civil cases; because,

1. The selection of jurors from all classes, renders it unreasonable, as well as apparently unsafe, to require them to pass upon such questions.

2. If jurors were to determine the law, its stability would be subverted.

3. All questions in regard to the admission or rejection of evidence being questions of law, are required to be decided by the court. If jurors are to decide law and fact, their jurisdiction should extend to these questions, which often control the verdict.

4. Where the jury find the facts of the case by a special verdict, if they also find a conclusion of law different from that which the law would derive from the same facts, the court disregards the conclusion, and gives judgment according to the facts found.

¹ 1 Bish. Cr. Pro., § 820.

² 1 Arch. Cr. Pr., § 172, note.

³ Eastwood v. Peo., 3 Park., 25.

⁴ Peo. v. Barker, 2 Whee. Cr. Cas., 21-22.

5. The fact that a jury find a verdict in a criminal case against law, the court will not set it aside, is owing more to the tenderness of the common law towards persons accused of crime, than to any recognized right of jurors to decide legal questions.

6. In all cases, civil and criminal, where only legal questions are raised, as by demurrers to pleadings, demurrers to evidence, special verdicts, bills of exceptions, such questions are decided by the court, and not by the jury.

7. The fact of guilt being ascertained and declared by the jury, the court determines the punishment which the law prescribes for the offence.¹

There is an exception to the above rule in the case of a prosecution for libel, where the jury are judges both of the law and fact.²

It is a reprehensible irregularity for a jury, after they have retired to deliberate on a trial for murder, to take the opinion of the constable in attendance on the question whether the jury could bring in a verdict of manslaughter, and to send for the Revised Statutes and examine their provisions in relation to the crimes of murder and manslaughter, and sufficient to vitiate a verdict of guilty, unless it appears beyond all reasonable doubt that no injury has resulted from it to the prisoner.³

§ 117. RETIREMENT OF THE JURY.

During the progress of the trial, and until the presiding judge has delivered his charge, the jurors sit in open court and are in its charge. At the termination of the trial the jury, where they do not agree in their seats, retire in the custody of a sworn officer of the court, a constable or a deputy sheriff, there to deliberate upon a verdict.⁴ The following oath is administered to the officer in such case:

"You shall well and truly keep every person sworn on this jury in some private and convenient place, without meat or drink,

¹ Abb. Dig. vol. 7, p. 618; *Duffy v. Peo.*, 26 N. Y., 588; 8 Barb., 610; 1 Park., 152; 2 Sumn., 243; 2 Blackf., 156; Add. Rep., 156, 255; App. to Id., 53; Stark. Ev., 450, part 3, § 51; Worth on Juris., 793; 4 Blac. Com., 391; 3 Term, 428; Cas. Temp. Hardw., 28.

² Const. N. Y., art. 1, § 8.

³ *Peo. v. Hartung*, 4 Park., 256.

⁴ Bish. Cr. Pro., § 821.

water excepted; you shall not suffer any person to speak to them, nor speak to them yourself without leave of the court except it be to ask them whether they have agreed upon their verdict, until they have agreed upon their verdict, so help you God.

After the jury have thus retired they may come back for the advice or opinion of the court upon any point, or they may request the judge to read over to them any particular part of the evidence, or they may get the court to ask any particular question of the witnesses; all this, however, must be done in open court.

§ 118. OF DISCHARGING THE JURY IN CASE OF THEIR INABILITY TO AGREE.

The general rule is, that the jury must be kept together from the time they are charged until they deliver their verdict, unless the prisoner consent to their being discharged.¹ But cases occur in which the judge from necessity is obliged to discharge them. If they cannot agree upon their verdict and they appear no likely to do so, the judge, in the exercise of his discretion, may discharge them as soon as it becomes a matter of necessity, on which he is to judge.² But this discharge of the jury has no effect on the prisoner; he has no right, on that account, to be discharged; but must, if in custody, remain imprisoned until another jury can be charged with him, unless, in the meantime he be bailed.³

Juries should not be discharged because upon the first comparing of opinions there happens to be a disagreement; temperate discussions may produce unanimity, and time should be allowed for that purpose; but when such time has been allowed, and the court become satisfied that there is no reasonable prospect of an agreement by further discussion, it then becomes their duty to discharge. The exercise of the discretion of the court in this respect cannot be reviewed on writ of error even where they were discharged after only thirty minutes' consultation.⁴

It has been said that the power of discharging a jury is a delicate and highly important trust; but that it exists in cases of

¹ 1 Arch. Cr. Pr., § 171.

² 2 Hawk., ch. 47, § 1; 1 Arch. Cr. Pr., 172.

³ R. v. Newton, 13 Shaw's J. P., 661; 1 Arch. Cr. Pr., § 172; *Peo. v. Goodwin*, 18 John., 187; 2 John. Cases, 275; *Id.*, 301.

⁴ R. v. Newton, 13 Shaw's J. P., 661; 1 Arch. Cr. Pr., § 172.

⁵ *Peo. v. Green*, 13 Wend., 56.

extreme and absolute necessity, and that it may be exercised without operating as an acquittal of the accused; that it extends as well to felonies as to misdemeanors, and that it exists and may be discreetly exercised in cases where the jury, from the length of time they have been considering a case and their inability to agree, may fairly be presumed as never likely to agree unless compelled to do so from the pressing calls of famine or bodily exhaustion.¹

§ 119. RENDITION OF THE VERDICT.

When the jury have come to a unanimous determination with respect to their verdict, they return to their seats in the court room, and the verdict is received by the court in the following manner:

The clerk of the court says:

"Gentlemen of the jury, please answer to your names." (*He then proceeds to call them one by one.*) "Have you agreed upon your verdict?" (*After the answer he says:*) "Jurors, look upon the prisoner." (*This last is omitted in cases other than felony or murder.*) "Who shall say for you? (The foreman rises.) "How say you, do you find the prisoner at the bar guilty of the felony (or felony and murder), (or misdemeanor,) (or offence, as the case may be,) whereof he stands indicted, or not guilty." (The foreman answers, "Guilty," or "Not guilty." *Then the clerk adds:*)

"Hearken to your verdict, gentleman, as the court has recorded it. You say you find the prisoner at the bar guilty (or not guilty) of the felony (or felony and murder) (or misdemeanor or offence, as the case may be,) whereof he stands indicted, and so say you all."²

The verdict in felonies should be declared in the presence of the defendant; although this is not necessary in cases of inferior misdemeanors, or where no corporal punishment is to be inflicted.³

§ 120. OF THE VERDICT.

It is laid down by elementary writers that the verdict of a jury in criminal cases is to be considered and delivered with the same

¹ *Peo. v. Ward*, 1 Whee. Cr. Cases, 466; 7 John. Cases, 276; *Id.*, 301.

² *Vide* 1 Chit. Cr. Law, 635.

³ *Ante.*

form as in civil cases,¹ and our statutes provide that the proceedings prescribed by law in civil cases in respect to the manner of rendering the verdict shall be had upon the trials of indictments.²

The verdict, in cases of felony, must be delivered in open court in the presence of the defendant.³ Though in trials for inferior misdemeanors, or where no corporal punishment is to be inflicted, a privy verdict may be given, and there is no occasion for the presence of the defendant.⁴

Therefore an agreement, in a capital case, between the district attorney and the counsel for the prisoner that the jury may deliver their verdict to the clerk is void.⁵

The verdict may be either general, guilty or not guilty, or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance on the facts stated, if it be murder, manslaughter or no crime at all. This is where they doubt the matter of the law, and therefore choose to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict.⁶

After the verdict is recorded it is a general rule that it cannot be amended,⁷ unless the mistake appear and be corrected promptly.⁸

It has been held, however, that a general, like a special verdict, may be amended in matter of form, though not in any substantial degree.⁹

So the jury may change their verdict after they have pronounced it in open court, and before it has been received and entered, and the verdict which is recorded will stand.¹⁰

¹ 1 Arch. Cr. Pr., § 173, note.

² 2 R. S., 735, § 14.

³ 1 Wend., 91; 1 Term R., 434; 1 Chit. Cr. Law, 636.

⁴ 1 Chit. Cr. Law, 636.

⁵ G. & W. on New Trials, vol. 3, p. 1408, and cases cited. See, also, 2 Haw. ch. 47, § 2; Co. Lit., 227; 3 Inst., 110.

⁶ 4 Blac. Com., 361.

⁷ 1 Chit. Cr. Law, 648; 2 Hale, 299; Co. Lit., 227 b.

⁸ 1 Ry. & Moo., C. C., 45.

⁹ 5 Burr, 2663; Dougl., 375.

¹⁰ G. & W. on New Trials, vol. 3, 1406, and cases cited; 1 Mood. C. C., 46; Dear. C. C., 229.

The court has a right to direct a jury to reconsider their verdict before it has been recorded, and it is its duty to do so if satisfied there has been a palpable mistake.¹ Thus, if they deliver an improper or an informal, or an insensible verdict, or one that is not responsive to the issue submitted.² But the verdict should not be altered even on motion and by direction of the court, after it has been entered by the clerk and the jury discharged.³

So, also, the court may direct a jury whose verdict is informal to retire, and say under which count of the indictment they found the defendant guilty, for, until the verdict is rendered and recorded, and the jury have separated, so far as no longer to constitute a jury, they have a right to modify the verdict that they have given, and declare the truth according to their judgment; that only is the verdict which, while they are a jury, is their final and definite agreement.⁴

In general, a verdict rendered on Sunday, is void; but our statute provides that no court shall be opened or transact any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury.⁵

On an indictment for embezzlement charged in several counts, a verdict of "guilty of embezzlement" is not void; for uncertainty, as not finding that the indictment or any part of it is true. The meaning of such verdict is guilty of embezzlement as charged in the indictment.⁶

A verdict of "guilty of assault and battery with intent to kill," without finding that the assault was made "with a deadly weapon," or "by such force as was likely to produce death," nor referring to the indictment specifically, warrants only a conviction for assault and battery.⁷

When the indictment charged the commission of an offence upon Mary B, it was held that the verdict should have been that such offence was committed upon her; finding the offence to have

¹ *Nelson v. Peo.*, 5 Park., 39; *Peo. v. Bush*, 3 Park., 552.

² 2 Hale, 299, 300; 2 Hawk. C., 47, § 11; Alleyne, 12; 1 And., 104; 2 Murrephy, 571; G. & W. on new trials, vol. 3, 1043, *et seq.*, and cases cited; 1 Chit. Cr. Law, 648.

³ *Guenther v. The Peo.*, 22 N. Y., 100.

⁴ *Peo. v. Graves*, 5 Park., 134; 7 Johns., 33.

⁵ 2 R. S., 275, § 16; 15 John., 119; 8 Barb., 385; 13 Ohio, 490.

⁶ *Guenther v. Peo.*, 24 N. Y., 100.

⁷ *Peo. v. Davis*, 4 Park. C. R., 61; *O'Leary v. Peo.*, Id., 187.

been committed upon a woman who is not named, does not show that the offence charged has been proved.¹

§ 121. VERDICT ON SEVERAL COUNTS OF THE INDICTMENT.

Each count in an indictment is a distinct charge, and a general verdict will be sustained although the counts are inconsistent.²

The jury may acquit the defendant of a part, and find him guilty as to another part; thus, they may convict him of one count of the indictment and acquit him of the charge contained in another, or upon one part of a count capable of division and not guilty of the other part, as on a count for composing and publishing a libel, the defendant may be found guilty of composing only.³

So, also, under an indictment for burglariously breaking in and stealing, the charge may be modified by showing a stealing alone, and the burglarious entry may be abandoned.⁴

If there are three counts in an indictment, and the jury convict the prisoner on the second, finding nothing as to the first and third, the verdict should not be set aside on that account; but the court should enter a verdict of acquittal on those two counts, although a verdict of conviction may be entered on the second.⁵

Where, upon an indictment containing three counts, the jury find the defendant not guilty on the first and cannot agree on the others the court may refuse to receive the verdict and have it recorded.⁶

A good finding on a bad count, and a bad finding on a good count, stand on the same footing, both being nullities.⁷

A general verdict of guilty is valid if one count of the indictment is good, although the others are defective;⁸ but this is not so if it appear that some of the counts are disposed of by the verdict.⁹

¹ *Cobel v. The Peo.*, 5 Park., 348. ² 5 Wheat., 184.

³ 1 Chit. Cr. Law, 637; 2 Campbell, 584, 646.

⁴ 2 Leach, 711; 2 East. P. C., 515, 516; Chit. Cr. Law, 638; 1 Blackf., 37; 1 Leach, 88; 2 Hale, 302; 1 Hayw., 12.

⁵ 2 Vir. Cases, 235.

⁶ *Harley v. State*, 6 Ham., 399.

⁷ *O'Connell v. Reg.*, 11 Clark & Fin., 155; 9 Jur., 25.

⁸ *Peo. v. Cooper*, 13 Wend., 379; 1 John., 320; 1 Chit. Cr. Law, 646; 1 Blackf., 319; 3 Hill, 194; 1 Park. Cr. R., 246; 5 Park., 31; 1 Park., 202; 4 Barb., 494.

⁹ 1 Park. Cr. R., 246.

And a verdict which fails to dispose of all the counts in an indictment cannot stand.¹

So a verdict that the prisoners are "guilty of the offence charged in the indictment" is equivalent to a general verdict of guilty, and, where such a verdict is rendered on an indictment charging several offences, the court may pass judgment on the count charging the highest grade of offence.²

Where the verdict, rendered by a jury upon an indictment, was not responsive to either count in the indictment, the court may refuse to receive it, and send the jury back with instructions to respond to the counts.³

Where a party is charged in one count in an indictment with stealing several specific articles, he may be found guilty of the larceny of one and discharged as to the rest; and if in such case the jury find a verdict of guilty of stealing one of the articles, and take no notice of the others, it is in fact a discharge as to the other articles, and a good verdict.⁴

So upon an indictment for stealing goods of the value of \$367, a verdict of stealing goods to the value of \$317, and not guilty as to the residue, will be sustained.⁵

Where the indictment is for burglary, with intent to commit larceny, and for the commission of such larceny, and the larceny itself is insufficiently charged, the prisoner may still be convicted of the burglary alone, if the evidence is sufficient to establish the offence charged.⁶

A count in an indictment which charges the breaking and entering in the night time of a shop adjoining to a dwelling-house with intent to commit a larceny, may be joined with a count which charges the stealing of goods in the same shop, and the defendant, if found guilty generally, may be sentenced for both offences. But if the breaking and entering and the actual stealing are charged in one count, only one offence is charged, and the defendant, on conviction, can be sentenced to one penalty only.⁷

¹ 1 Park. Cr. R., 246.

² Conkey v. Peo., 5 Park., 31; Whart. Cr. Law, 1037, § 3048; 12 Sergt. & R., 191.

³ Nelson v. Peo., 23 N. Y., 293.

⁴ Swinney v. State, 8 Smeads & Marsh, 576.

⁵ Com. v. Duffy, 11 Cush., 145.

⁶ Peo. v. Marks, 4 Park. Cr. R., 153.

⁷ Josslyn v. Com., 6 Metc. Rep., 236.

Upon an indictment charging nine counts for embezzlement of different grades, and others for larceny, a verdict guilty of embezzlement is an acquittal of the larcenies charged.¹

§ 122. VERDICT AGAINST SOME OF SEVERAL DEFENDANTS.

If several be jointly indicted for an offence which, in its nature may be committed by one person, or several, the indictment is considered in law as a several indictment against each, and the jury may, upon the evidence, acquit one or more of them, and find the others guilty.²

So, where the jury have agreed as to one or more of several prisoners, their verdict as to them ought to be received, though they cannot agree as to the rest, and are from necessity discharged by the court.³

So, where two defendants are charged, one as principal in the first, and the other in the second degree, as present, aiding and abetting, the latter may be found guilty, though the former is acquitted.⁴

If, however, an accessory be indicted at the same time with the principal, if the latter be acquitted, the former must also be acquitted, since his guilt is entirely inconsistent with the innocence of him who is charged as principal.⁵

Where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge.⁶

Where the charge is of such a nature that one, as in a case of conspiracy, or two, as that of a riot, cannot be guilty without the union of others, if all the rest are acquitted, and the indictment does not charge the offence to have been perpetrated in company with any other persons unknown, the verdict of guilty would be altogether repugnant and void;⁷ but where one is indicted for a conspiracy, or two for a riot, with others, the conviction will be

¹ Gunther v. Peo., 24 N. Y., 100.

² 1 Arch. Cr. Pr., 176; 2 Hawk., ch. 47, § 8; R. v. Toggart, 1 Car. & P., 20 3 Term R., 105; 2 St. Tr., 526.

³ 6 Serg. & R., 577; 12 Mass., 313.

⁴ 1 Leach, 360.

⁵ Stark, 332.

⁶ O'Connell v. The Queen, 11 Clark & Fin., 155; 9 Jur., 25.

⁷ 1 Chit. Cr. Law, 640; 2 Hawk., ch. 47, § 8; Poph., 202.

valid, though the others never come in to be tried, or die before the time of trial.¹

Upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only.²

Two cannot be convicted upon an indictment charging a joint larceny, unless there be evidence to satisfy a jury that they were concerned in a joint taking.³

Where two persons are indicted together for stealing the same goods, one cannot be convicted of petit larceny and the other of grand larceny.⁴

Though two or more persons jointly indicted cannot be convicted of a joint offence, where these offences are proved to have been separate; yet they may be convicted of their separate offences, as if separate indictments had been found.⁵

§ 123. VERDICT FOR A LESS OFFENCE THAN IS CHARGED.

Upon an indictment for any offence consisting of different degrees, as prescribed by the Revised Statutes, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence inferior to that charged in the indictment, or of an attempt to commit such offence.⁶

The above provisions of the Revised Statutes have been decided to be constitutional, for a prisoner charged with a crime in one degree, where the statute allows the jury to convict him of the same crime in an inferior degree, is bound to take notice of such statute and prepare to meet the charge in all its inferior degrees.⁷

But a conviction of a lower degree of an offence, than that charged in the indictment, can only be had where the indictment avers the facts with sufficient particularity of description necessary to constitute the lower degree of the crime.

¹ 1 Chit. Cr. Law, 641.

² Rex v. Butterworth, Russ. & Ryan, 344.

³ 2 Star. on Evidence, 840.

⁴ State v. Larumbo, Harper, 183; State v. Davis, 3 McCord, 187.

⁵ Chatterton v. Peo., 15 Abb., 147; 4 Hawk., 53; 1 Arch. Cr. Pro., 96.

⁶ 2 R. S., 702, § 37.

⁷ Peo. v. Dedien, 17 How., 224.

The above cited provision of the statute means only that there is no legal objection to the conviction, arising out of the circumstance that the crime is divided into degrees. It applies only when the indictment includes a true description of the act done, and of all the circumstances defining the minor offence, and alleges, in addition, circumstances which, if proved, would raise the crime to the higher degree. The act proved must be the identical act set forth in the indictment, and the circumstances descriptive of the inferior degree of which the defendant is to be convicted, must be also parts of the offence contained in the higher degree, and contained in the indictment.¹

But in an arson case the court held, that the defendant might be convicted of arson in the second degree, as having burned a building not the subject of arson in the first degree, if the jury disregarded the evidence offered to show that there was some human being in the dwelling at the time; for the charge of firing a building with a human being in it includes the lesser crime of firing it without one in it.²

Upon an indictment for a felony the defendant may be convicted of a misdemeanor. The above provision of the statute has not affected the common law rule, respecting the right to convict of an inferior offence upon an indictment for a superior one.³

The statute also further provides that, upon an indictment against any person for an assault with intent to kill, it shall and may be lawful for the jury to find such accused person guilty of an assault with intent to do bodily harm within the provisions of the statute.⁴

So, under an indictment for murder, the defendant may be convicted of manslaughter, or he may be convicted of simple larceny under an indictment for burglary or robbery,⁵ or on an indictment for rape, of an assault with intent to commit a rape.⁶

¹ *Peo. v. Didien*, 22 N. Y., 178.

² *Hennessy v. Peo.*, 21 How. Pr., 239.

³ *Peo. v. Jackson*, 3 Hill, 92, and cases cited.

⁴ 2 R. S., 689 § 25.

⁵ *Id.*, 2 Hawk., ch. 47, §§ 4, 5, 11, 12; 19 Pick., 479; 22 Pick., 1-7; 21 Pick., 523; *Peo. v. Snyder*, 2 Park. Cr. R., 23.

⁶ 1 Lewin, 16, 15 Mass., 187; 7 Conn., 54. But see 12 Pick., 507, where the correctness of the above doctrine is doubted; vide, also, for other cases illustrating the rule: 1 Hale, 534; 2 East. P. C., 736-784; 2 Leach, 671; Russ. & Ry. C. C., 416; 3 Hale, 184; 2 Hale, 502; Fost., 329; 2 Hawk., ch. 47, § 6.

But upon the trial of an indictment for murder the accused cannot be convicted of a simple assault and battery, though he may be of manslaughter; manslaughter and murder are different degrees of the offence of homicide, and hence a conviction for manslaughter, upon an indictment for murder, is authorized by the statute, but assault and battery is not any degree of homicide.¹

Though an indictment for petit larceny charges it as a second offence, and the commission of the prior larceny is not proved, yet the prisoner may be convicted of larceny as a first offence.² Where an indictment for rape charges one as principal in the first degree, and the others as present, aiding and assisting, they may all be convicted of an assault if the rape be not proved.³

A verdict by which the prisoner is found "guilty of an assault and battery with intent to kill," without reference to a sufficient indictment and without specifying the means by which the assault and battery were committed, will authorize no sentence for any offence beyond a simple assault and battery.⁴

When it turns out, upon an indictment for rape, that the woman was induced by fraud to consent, supposing the prisoner to be her husband, the prisoner may be convicted of an assault; for if resistance be prevented by fraud that is sufficient.⁵

Under an indictment for a rape, where the facts proved are not sufficient to establish the commission of that offence, the prisoner may be convicted of an assault.⁶

Where the defendant is tried in a court of sessions on an indictment for rape and an assault, with intent, &c., and the jury convict of an assault and battery merely, judgment cannot be rendered, since the sessions have not jurisdiction of the offence of rape.⁷

So, also, of forgery charged as after a conviction for a previous felony, it is competent for the jury to convict of forgery, without noticing the previous conviction.⁸

¹ Burns v. Peo. 1 Park., 182.

² Palmer v. The Peo., 5 Hill, 427.

³ Reg. v. Finchard, 1 Russ. on Cr., 692.

⁴ Peo. v. Davis, 4 Park., 61; O'Leary v. Peo., Id., 187.

⁵ Reg. v. Williams, 8 C. & P., 286; Reg. v. Saunders, 8 C. & P., 265.

⁶ 2 R. S., 702, § 27; 15 Mass. R., 187.

⁷ Peo. v. Abbott, 19 Wend., 192.

⁸ Vincent v. Peo., 15 Abb. Pr., 234.

§ 124. VERDICT SHALL NOT BE FOR AN ATTEMPT WHEN PERPETRATED.

No person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit any crime, if it shall appear that the crime intended, or the offence was not perpetrated by such person at the time of the assault, or in pursuance of such attempt.¹

In an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, if the defendant be acquitted on the count for an assault with intent to commit a rape, on the ground that the prosecutrix consented, he shall be convicted on the count for a common assault.²

Where there is no reason to expect that the facts and circumstances of the case when given in evidence, will establish that the crime of rape has been completed, the proper course is to prefer a complaint for assault with intent to ravish, which is of an aggravated nature, and has in many cases been punished with exemplary punishment. But this proceeding is not adopted where there is any probability that the defendant will be proved, as where upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape committed, the judge directed an acquittal upon the count for the lesser offence was merged in the higher.³

§ 125. SPECIAL VERDICT.

As before stated, the jury may render a special verdict. It is also further provided by statute that no jury shall be compelled to give a general verdict, so that the jury may render a verdict, showing the facts respecting which issues are therein require the judgment of the court on such facts.

A special verdict, as before stated, is rendered when the jury find certain facts to exist, and leave the court to determine whether or not, according to the law which controls the case, the defendant is guilty.⁴

¹ 2 R. S. 702., § 36.

² *Rex v. Mederdith*, 8 C. & P., 589.

³ 1 Russ. on Cr., 692.

⁴ Ante.

⁵ 2 R. S., 421, § 135.

⁶ 1 Arch. Cr. Pro., § 176, note.

To authorize the court to pronounce judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence from the facts stated.¹

It is not necessary that the jury, after stating the facts, should draw any legal conclusion. If they do so, the court will reject the conclusion as superfluous, and pronounce such judgment as they think warranted by the facts.²

No particular form of words is necessary to be followed with technical exactness in drawing up a special verdict. It must positively state the facts themselves, and not merely the evidence adduced to prove them.³

Where the fact is of a transitory nature, the jury may find it to have occurred in another place within the county than that named in the proceedings.⁴

The court cannot supply a defect in the statement made by the jury, in the record by any intendment or implication whatever;⁵ and all the circumstances constituting the offence must be found, in order to enable the court to give judgment.⁶

It is said that, although a special verdict cannot be amended in matters of fact, yet the court may amend a mere error in form, even in capital cases, when there are any notes or minutes by which it can be amended; and where the alteration is merely to fulfill the evident intention of the jury, the court will in all cases allow it to be amended; but that it will not amend by supplying facts incompatible with those found by the jury.⁷

§ 126. POLLING THE JURY.

The object of polling the jury is to ascertain whether the verdict rendered by the foreman in behalf of himself and the rest, is really concurred in by the others.⁸

Lord HALE says, if the jury say they are agreed, the court may examine them by poll.⁹

¹ 2 McCord, 129.

² 1 Chit. Cr. L., 645.

³ 2 Swan, 399; 1 Chit. Cr. L., 643.

⁴ 1 Chit. Cr. L., 644.

⁵ 2 East. P. C., 708-784.

⁶ 2 Stra., 1015.

⁷ 1 Chit. Cr. L., 645; 2 McCord, 129.

⁸ State v. Bogain, 12 La. An., 264; State v. John, 8 Ire., 330.

⁹ 2 Hale's P. C., 299; Watts v. Brains, Cro. Eliz., 78.

Though the juror has in fact consented to the verdict ; tho even it is in writing, and he has signed it, yet he has the right to dissent at any time before it is finally recorded.¹

The defendant in this State has a right to poll the jury.²

When the polling of the jury is demanded, the clerk will begin with the first name on the panel : " A. B., how do you find the prisoner at the bar, guilty or not guilty ?" (when the foreman has answered, he then calls the next juror, as follows :) " C. is that your verdict ?" (the clerk then proceeds in the same manner through the whole panel, and when all have answered he says :) " Then gentlemen of the jury hearken to your verdict, the court has recorded it. You say you find the prisoner at the bar guilty of the felony (or felony and murder, or misdemeanor or offence, as the case may be) whereof he stands indicted, so say you all?"

§ 127. MOTION IN ARREST OF JUDGMENT.

After the jury have rendered their verdict, and before the sentence of the court has been pronounced, the defendant may move in arrest of judgment, for all defects or matters of objection which are not cured by verdict.³ A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a verdict against him. By arrest of judgment is meant the refusal of the court to enter a judgment, for a cause apparent upon the record. The judgment of the court being a conclusion of law, from the facts upon the record, it is to be collected from the whole record. If, therefore, the record itself shows no ground for judgment, it cannot be rendered, though verdict of guilty be found.⁴

The causes on which this motion is grounded are numerous, but are confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous, and, therefore, no defect in evidence, or improper conduct on the trial, can be urged in this stage of the proceedings.⁵

¹ 2 Hale's P. C., 299 ; *Burk v. Com.*, 5 J. J. Mar., 675 ; *Rex v. Parle Moody*, 45.

² *Peo. v. Perkins*, 1 Wend., 91.

³ 1 Arch. Cr. Pr., § 178.

⁴ *Idem*, note ; *State v. Allen*, R. M. Chart. R., 518.

⁵ 1 *Ld. Ray.*, 231 ; 1 *Selk.*, 77 ; 4 *Burr.*, 2287 ; 1 *Sid.*, 35 ; 7 *Blackf.*, Com. Dig. Indict., N ; 8 *Sme. & Mar.*, 573 ; 9 *Id.*, 465 ; 1 *Hemp.*, 1.

Among the grounds for arrest of judgment may be mentioned the following: Any want of sufficient certainty in the indictment respecting the time, place or offence, which is material to support the charge, as well as the circumstance of no offence being charged.¹ So, also, where no issue has been joined between the people and the defendant;² and where it appeared that the case had been tried by thirteen jurors;³ also, where the defendant had been tried in a different district from that directed by law.⁴ So, also, where the verdict itself is insensible.⁵

There are, however, several points in which an indictment is cured by verdict, and in which the errors that might have been taken advantage of at a previous stage, are not sufficient to arrest judgment.⁶ Thus, while duplicity is fatal on motion to quash, or demurrer, the better opinion is that it will not be ground for arrest,⁷ and the same position is undoubtedly good when there has been a misjoinder of counts, but the defendant has gone to trial without a motion to quash, or an application for election.⁸ So, also, the practice is said to be not to arrest judgment on the ground of irregularities in the summoning, or the procedure of the grand jury.⁹ Nor is it ground to arrest the judgment, that the jury were under the charge of an unsworn officer.¹⁰ Judgment will not be arrested for a variance between the indictment and the proofs, but only for defects apparent on the record.¹¹

So it is too late, after verdict, to object to argumentative pleading in an indictment.¹²

The statute provides that certain omissions in an indictment shall not cause the same to be deemed invalid, nor shall they

¹ 4 Blac. Com. 375; 3 Burr., 190; 1 East., 146.

² State v. Fort, 1 Car. Law Rep., 510.

³ 2 Hayw. 113. Vide 2 Ash., 91; 21 Pick., 509; 3 Metc., 330.

⁴ 1 Brevard, 47.

⁵ Com. v. Cole, 21 Pick., 509.

⁶ Whar. Cr. L., 3d ed., 975.

⁷ Idem; Com. v. Tuck, 20 Pick., 356; State v. Jackson, 3 Hill's S. C. R., 1; Whar. Cr. L., 3d ed., 192-194, 242-244.

⁸ Whar. Cr. L., 3d ed., 975, 154; Com. v. Gillispie, 7 Serg. & R., 476.

⁹ Whar. Cr. L., 3d ed., 975, 226-229; 2 Ashmead, 70.

¹⁰ 9 Sme. & Mar. R., 465.

¹¹ Peo. v. Onondaga Sess., 1 Wend., 296.

¹² Peo. v. Warner, 4 Barb., 314; 12 Wend., 425; 16 Id., 53; Charles v. Peo.,

1 N. Y. (1 Com.), 180; see Peo. v. Powers, 6 N. Y., 50.

affect the trial, judgment or other proceedings,¹ and by the same statute the trial, judgment or other proceedings are not to be affected by reason of defects or imperfections in matters of form which do not tend to the prejudice of the defendant.²

In motions for the arrest of judgment, on account of an objection to the form of the indictment, one good count, even if others are defective, will support a general verdict of guilty.³

The defendant may move at any time in arrest of judgment before the sentence is actually pronounced upon him,⁴ and if the sentence is once pronounced, though before the actual entry of the judgment, the court are not bound to attend at all to a motion of this nature, even though a formal error should be discovered sufficient to reverse the proceedings;⁵ but the court may, if they think fit, arrest the judgment, notwithstanding that it has been given.⁶ In such case the motion, however, cannot be entertained after judgment against the defendant on demurrer.⁷

In motions for arrest of judgment the causes for the arrest should be specified.⁸

The court may also arrest the judgment upon its own motion without any application of the defendant, and even where the defendant waives the motion; if the court, upon a review of the whole case, are satisfied that he has not been guilty of any offence in law they will of themselves arrest the judgment.⁹

If the objections taken in arrest of judgment be valid the whole proceedings will be set aside, but the party may be indicted again.¹⁰

¹ 2 R. S., 728, § 54; see motion to quash, ante page 267, and indictment, post page.

² Id., 6 N. Y., 50.

³ *Peo. v. Stein*, 1 Park. 202; Id., 246; 3 Gray, 463; 5 McLean, 23; 1 John., 320.

⁴ 5 T. R., 445; 2 Burr, 801; 2 Stra., 845.

⁵ 3 Burr, 1901, 1902, 1903; Com. Dig. Indict., N.

⁶ 2 Lord Raym., 1221.

⁷ Id.

⁸ *State v. Wing*, 32 Maine, 581.

⁹ 1 East., 146; 11 Harg. St. Tr., 299.

¹⁰ 4 Blac. Com., 375.

SECTION IV.

OF THE SENTENCE AND PUNISHMENT.

- Section CXXXVIII.—PRONOUNCING THE SENTENCE.
 CXXXIX.—OF THE SENTENCE OR JUDGMENT.
 CXXX.—SENTENCE TO EXPIRE BETWEEN MARCH AND NOVEMBER.
 CXXXI.—SENTENCE, WHEN THERE ARE SEVERAL CONVICTIONS AT THE SAME TIME.
 CXXXII.—COURTS TO EXAMINE CONVICTS AS TO THEIR HAVING LEARNED A TRADE.
 CXXXIII.—PERSONS UNDER SIXTEEN YEARS OF AGE MAY BE SENTENCED TO THE HOUSE OF REFUGE.
 CXXXIV.—PERSONS OVER SIXTEEN AND UNDER TWENTY-ONE YEARS OF AGE, MAY BE SENTENCED TO THE PENITENTIARY INSTEAD OF STATE PRISON.
 CXXXV.—WHAT STATE PRISONS CONVICTS SHALL BE SENTENCED TO BE CONFINED IN.
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 CXXXVII.—OF THE DISQUALIFICATIONS CONSEQUENT UPON SENTENCE.
 CXXXVIII.—COPIES OF SENTENCE, WHEN TO BE FURNISHED SHERIFF, AND HIS DUTY THEREON.
 CXXXIX.—ENTERING JUDGMENT IN THE MINUTES.
 CXL.—RECORDS OF JUDGMENT.
 CXLI.—OF THE PUNISHMENT.
 CXLII.—OF THE PUNISHMENT FOR FELONIES.
 CXLIII.—PUNISHMENT FOR MISDEMEANORS.
 CXLIV.—SURETY OF THE PEACE MAY BE REQUIRED OF CONVICT IN ADDITION TO PUNISHMENT.
 CXLV.—PUNISHMENT OF ACCESSORIES BEFORE THE ACT, AND PRINCIPALS IN THE SECOND DEGREE.
 CXLVI.—PUNISHMENT OF ACCESSORIES AFTER THE FACT.
 CXLVII.—PUNISHMENT FOR ATTEMPTS TO COMMIT OFFENCES.
 CXLVIII.—PUNISHMENT OF PERSONS COMMITTING SECOND OFFENCE, AFTER PREVIOUS CONVICTION OF A FELONY.
 CXLIX.—PUNISHMENT OF PERSONS COMMITTING SECOND OFFENCE AFTER PREVIOUS CONVICTION OF PETIT LARCENY, OR FOR CERTAIN ATTEMPTS TO COMMIT OFFENCES.
 CL.—PUNISHMENT OF PERSONS CONVICTED IN THIS STATE, AFTER PREVIOUS CONVICTION IN OTHER STATES OR FOREIGN TERRITORIES.
 CLI.—PERSONS CONFINED FOR FINES, WHEN DISCHARGED IF UNABLE TO PAY FINE.
 CLII.—ENFORCEMENT OF FINES AGAINST CORPORATIONS.

§ 128. PRONOUNCING THE SENTENCE.

THE verdict of the jury having been duly rendered and docketed by the clerk, and no motion in arrest of judgment having been granted, the court proceeds to sentence the prisoner. Before proceeding to the sentence, the crier makes the following proclamation: "Here ye, here ye! All manner of persons are commanded to keep silence while judgment is given against the prisoner at the bar, upon pain of imprisonment."

The judge usually precedes the judgment by an address to the prisoner, especially if his crime be capital, in which he states that he has been convicted on satisfactory evidence, and informs him that there is little hope that mercy will be extended to him. Sometimes, also, he takes an opportunity of impressing the circumstances of the prisoner's guilt on the minds of the spectators,

and traces out the remote but important causes which have led to his unhappy condition. Even in the case of an acquittal, he may often usefully warn the defendant against the circumstances which might again place him in an equivocal situation, especially if there seems reasonable ground to believe him guilty. It is obvious, however, that the above formalities are not indispensable, and if they are omitted, the judgment is good.¹

The judgment or sentence of the court is usually given soon after the conviction, at least during the same term of the court at which the prisoner is convicted, unless the rendering of the judgment is stayed by the filing of a bill of exceptions for the purpose of taking the opinion of the Supreme Court upon the case.² When corporal punishment is to be inflicted on the defendant, it is absolutely necessary, unless some statute has otherwise directed, that he should be personally before the court at the time of pronouncing the sentence; but the personal presence of the defendant, is not necessary where a fine only is imposed.³ But where the defendant is found guilty, and the court pronounce judgment that he pay a fine and stand committed until it be paid, and the imprisonment is no part of the punishment, but only a mode of enforcing payment of the fine, it is not necessary that the defendant should be present.⁴

It is made the duty of the court in which any person shall be convicted of an offence, punishable in a State prison, before passing the sentence, to ascertain by the examination of such convict on oath, and in addition to such oath, by such other evidence as can be obtained, whether such convict had learned and practiced any mechanical trade, and the clerk of the court shall enter the facts, as ascertained and decided by the court, on the minutes thereof, and shall deliver a certificate stating the facts as ascertained to the sheriff of the county, who shall cause the same to be delivered to the warden of the proper prison, at the time that such convict is delivered to the said warden pursuant to his sentence.⁵

¹ 1 Bish. Cr. Pro.; 1 Gisb. Duties of Man, 405. Vide sentence in *Peo. v. Thayer*, 1 Park., 599.

² 1 Arch. Cr. Pr., § 180, note; 1 Ohit. Cr. L., 699; 2 R. S., 736.

³ *Peo. v. Clark*, 1 Park., 360; 12 Wend., 348; 1 Ld. Raym., 267; 7 Cow., 524; 2 Ala., 212; 5 Engl., Ark, 318.

⁴ *Son v. Peo.*, 12 Wend., 344; 1 Va. Cas., 172.

⁵ 2 R. S., 5th ed., vol. 3, p. 1086, § 85.

the act of 1861,¹ it is made the duty of the sheriff to transmit to the secretary of State a statement showing the name, occupation, age, sex and native country of the persons convicted of any crime at a criminal court of record; and for the purpose of obtaining this information, the court generally, before proceeding to the sentence, and at the same time the inquiries are made in relation to the learning and practicing of a mechanical trade by the convict, ascertains these facts from the convict himself. An examination is generally administered to the convict by the clerk, to obtain true answers to such questions as shall be put to him by the court, touching his name, occupation, age, place of nativity, and whether he has ever learned or practiced any mechanical trade, and the correctness of the prisoner's answers are then made upon the minutes of the court.

In all cases of felony, before passing the sentence, the court is required to demand from the defendant what he has to say why judgment should not be pronounced against him, and the fact that the defendant was present, and that such demand was made, ought to appear from the record.²

At this occasion, he may allege ground in arrest of judgment, and may plead a pardon, if he has obtained one, for it will have the same consequence which it would have had before conviction; and if he has nothing to urge in bar, he frequently addresses the court, in mitigation of his conduct, and desires its intercession with the pardoning power, or casts himself upon their mercy; after this, nothing more is done, but the presiding judge pronounces the sentence.⁴

By inadvertance in passing the sentence, a requirement of statute has been overlooked the court may correct the judgment at the same term and before the sheriff has proceeded to execute it; such correction may be made by expunging or vacating the first sentence and passing a new sentence.⁵

The court has authority to suspend sentence indefinitely against criminals who have been found guilty by a jury or have pleaded guilty; a suspension of sentence or stay is not authorized, except

¹ Laws 1861, ch. 97, p. 173.

² *Afford v. The Peo.*, 1 Park., 474.

³ *Blac. Com.*, 376.

⁴ *Bish. Cr. Pro.*, 865.

⁵ *Miller v. Finkle*, 1 Park., 374.

upon a certiorari or writ of error, or an application in arrest of judgment or for a new trial.¹

After the verdict of the jury has been rendered it is sometimes the practice to submit affidavits to the court in mitigation of the punishment, when such are presented they should not controvert the facts upon which the verdict is founded.²

In a prosecution for assault and battery, the court will receive affidavits in mitigation of the punishment, from the defendant after conviction, and affidavits in aggravation from the prosecution; but, in the absence of affidavits in mitigation, those in aggravation should not generally be received.³

The service of affidavits, in such cases upon the opposite party, is not required.⁴

§ 129. OF THE SENTENCE OR JUDGMENT.

The judgment is the conclusion and sentence of the law, passed by the court upon facts found or admitted in the course of the criminal proceedings against a party,⁵ and it must not be dependent upon any contingency nor subject to any future decision, but must be unconditional.⁶ Thus, a sentence of the defendant to the work-house until released by order of law, is erroneous, since it is for an indefinite time.⁷

A joint sentence may be, and frequently is, passed on several offenders convicted of similar offences.⁸

Where a party, convicted of an offence, is subject to two distinct and independent punishments, it cannot be alleged for error by the defendant, that only one of the punishments to which he is liable is adjudged against him; the prosecutor may complain of such omission, but not the party convicted.⁹

In an indictment against two or more, it is generally true that the charge is several as well as joint; so that if one is found guilty, judgment may be rendered against him, though one or

¹ *Peo. v. Morresette*, 20 How., 118.

² *Rooney's Case*, 3 City H. R., 128; *Ball's Case*, 4 Id., 113.

³ *Hagerman's Case*, 3 City H. Rec., 73, 89.

⁴ Id.

⁵ *Burn's Just.*, tit., Judgment.

⁶ *State v. Bennett*, 4 Dev. & Batt., 43; *Morris v. State*, 1 Blackf., 37.

⁷ *Washburn v. Bellknap*, 3 Conn., 50.

⁸ 1 Chit. Cr. L., 700; 2 Burr., 984; 6 Harg. St. Tr., 833.

⁹ *Kane v. Peo.*, 8 Wend., 203.

more be acquitted; to this rule, however, there are exceptions, as in cases of conspiracy or riot, to which the agency of two or more is essential.¹

Judgment is rendered in the court in which the defendant is convicted, except where an indictment has been removed from a court of oyer and terminer, or any other court, into the Supreme Court, and a conviction is had thereon at a circuit court; judgment may be rendered thereon by such circuit court or any other circuit court, which may be held in the same county, with the same effect as a court of oyer and terminer may render judgment upon a conviction had therein.²

But whenever, after conviction upon any indictment, the record thereof shall be removed from any other court into the Supreme Court, for the purpose of review, the Supreme Court shall, upon affirming or reversing the judgment or other proceedings, remit the record to the court from which the same was removed, and the court to which the same shall be so remitted, shall have power to proceed thereon according to the decision and discretion of the Supreme Court.³

An offence in regard to which there is a discretion vested in the court to punish it either by imprisonment in the State prison, or by fine or by imprisonment in the county jail, is within the statutory definition of felony. If the offender, on conviction, be liable to imprisonment in the State prison, he is guilty of felony, though he be also liable to the infliction of less severe punishment.⁴

§ 130. SENTENCE TO EXPIRE BETWEEN MARCH AND NOVEMBER.

In cases where convicts are sentenced to imprisonment in the State prison for a longer period than one year, the court before whom the conviction shall be had, are directed to so limit the time of sentence that it will expire between the month of March and the month of November, unless the exact period of the sentence may be fixed by law.⁵

The above provision is merely directory, and a failure to comply with such direction, does not render the sentence void.⁶

¹ *Com. v. Griffin*, 3 Cush., 523.

² 2 R. S., 747, § 25; *Laws* 1859, ch. 462, § 1, p. 1074.

³ *Laws* 1859, ch. 462, p. 1074, § 2.

⁴ *Peo. v. Van Steenburgh*, 1 Park., 39.

⁵ 2 R. S., 700, § 13; *Laws* 1836, ch. 171 § 6; *Laws* 1862, ch. 417.

⁶ *Miller v. Finkle*, 1 Park., 374.

In cases of forcible entry, if the force be continuing, or the prosecutor expelled, part of the judgment is that the prosecutor have restitution of his premises. In cases of a public nuisance, if it be continuing, part of the judgment is that it be abated. If an offender be adjudged to pay a fine, and also to be imprisoned, then, although he is imprisoned, the fine may be levied also, if he have any property upon which to levy it.¹

Fines are the lowest species of punishment which courts of justice have power to inflict. At one time, they formed almost the only penalty to which the opulent were liable; when murder itself was commuted, by a sum of money; when judges were in many cases mere agents for the crown and collectors for the treasury.²

§ 131. SENTENCE WHEN THERE ARE SEVERAL CONVICTIONS AT THE SAME TIME.

When any person shall be convicted of two or more offences, before sentence shall have been pronounced upon him for either offence, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction, shall commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second term of imprisonment, as the case may be.³

§ 132. COURTS TO EXAMINE CONVICTS AS TO THEIR HAVING LEARNED A TRADE.

It shall be the duty of the court in which any person shall be convicted of an offence punishable in a State prison, before passing the sentence, to ascertain by the examination of such convict on oath, and in addition to such oath, by such other evidence as can be obtained, whether such convict had learned and practiced any mechanical trade, and the clerk of the court shall enter the facts as ascertained and decided by the court on the minutes thereof, and shall deliver a certificate stating the facts as ascertained to the sheriff of the county, who shall cause the same to be delivered to the warden of the proper prison, at the same time that such convict is delivered to the said warden pursuant to his sentence.⁴

¹ 1 Arch. Pr., 205.

³ 3 Salk., 32. See 11 Harg. St. Tr., 292.

² 2 R. S., 700, § 11; 7 Serg. & Rawle, 489.

⁴ 2 R. S., 5th ed., vol. 3, p. 1086, § 85.

§ 133. PERSONS UNDER SIXTEEN YEARS OF AGE MAY BE SENTENCED TO THE HOUSE OF REFUGE.

Whenever any person, under the age of sixteen years, shall be convicted of any felony or other crime, the court, instead of sentencing such person to imprisonment in a State prison or county jail, may order that he be removed to and confined in the house of refuge established by the Society for the Reformation of Juvenile Delinquents in the city of New York, unless notice shall have been received from such society that there is not room in such house for the reception of further delinquents.¹

The above provision of the statute, however, is applicable only to such delinquents sentenced in the first, second and third judicial districts of this State; for, by a subsequent act, it is made the duty of the several courts, having criminal jurisdiction, who shall hold courts in the fourth, fifth, sixth, seventh and eighth judicial districts of this State, to order all juvenile delinquents, by them respectively sentenced, to be removed to the "Western House of Refuge for Juvenile Delinquents," in the city of Rochester.²

It is the duty of courts of criminal jurisdiction in the several counties, which are designated as the counties from which juvenile delinquents are to be sent to the house of refuge, to ascertain, by such proof as may be in their power, the age of every delinquent by them respectively sentenced to the said house of refuge, and to insert such age in the order of commitment, and the age thus ascertained shall be deemed and taken to be the true age of such delinquent.³

In cases where any such court shall omit to insert in the order of commitment the age of any delinquent committed to the said house of refuge, the managers shall, as soon as may be, after such delinquent shall be received by them, ascertain his age by the best means in their power, and cause the same to be entered in a book to be designated by them for that purpose, and the age of such delinquent thus ascertained shall be deemed and taken to be the true age of such delinquent.⁴

¹ 2 R. S., 701, § 18; Laws 1840, ch. 100.

² Laws 1850, ch. 24, § 1.

³ Laws 1852, ch. 387, § 2; 2 R. S., 701, § 22.

⁴ 2 R. S., 701, § 23; Laws 1852, ch. 387, § 3.

§ 134. PERSONS, OVER SIXTEEN AND UNDER TWENTY-ONE YEARS OF AGE, MAY BE SENTENCED TO THE PENITENTIARY INSTEAD OF STATE'S PRISON.

Whenever any person, under the age of twenty-one and above the age of sixteen years, shall be convicted of an offence punishable with imprisonment in the State prison, in either of the judicial districts of the State having a penitentiary within said judicial district, the court, before which such conviction shall be had, may, in its discretion, sentence the person so convicted to imprisonment in the penitentiary situated in that judicial district. Every person so sentenced shall be received into the said penitentiary, and shall be kept and employed in the manner prescribed by law, and shall be subject to the rules and discipline of said penitentiary.

And it shall be the duty of the sheriff of any county within the said judicial district, in which any person shall be convicted and sentenced as above provided, to convey such person to the penitentiary situated in such judicial district, and deliver him to the superintendent thereof; for which, such sheriff shall be paid by the State treasurer such fees as are allowed by law for conveying convicts to the State prison.²

§ 135. WHAT STATE PRISONS CONVICTS SHALL BE SENTENCED TO BE CONFINED IN.

All male convicts, sentenced in the first and second judicial districts to an imprisonment in the State prison, shall be confined in the State prison at Sing Sing; and all so sentenced in the fifth, sixth, seventh and eighth judicial districts, in the State prison at Auburn; and all so sentenced in the other judicial districts of the State, in the Clinton State prison.

All female convicts, sentenced in any county in the State to imprisonment in a State prison, shall be confined in the female convict prison at Sing Sing.³

§ 136. OF STAYING THE SENTENCE.

Even after judgment is pronounced, there are cases in which the execution of the sentence will be stayed. Certain provisions of

¹ Laws 1856, ch. 158, § 1.

² Id., § 2.

³ 3d vol. R. S., 5th ed., p. 1089, §§ 99, 100.

the statute provide that the execution of the judgment will be stayed in cases where the judgment is sought to be reviewed by writ of error. This subject will be found treated of in a subsequent chapter.¹ The statutes also provide, that no act done by a person in a state of insanity can be punished as an offence, and no insane person can be sentenced to any punishment, or punished for any crime or offence while he continues in that state.²

In case a convict shall be sentenced to the punishment of death, and shall afterwards become insane, the sheriff of the county, with the concurrence of a justice of the Supreme Court, or, if he be absent from the county, with the concurrence of the county judge of the county in which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county.³

The district attorney shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas as for witnesses to attend a grand jury, and disobedience thereto may be punished by the court of oyer and terminer, which shall next sit in such county, in the same manner as disobedience to any process issued by such court.⁴

The inquisition of the jury shall be signed by them and the sheriff. If it be found, by such inquisition, that such convict is insane, the sheriff shall suspend execution of the warrant directing the death of such convict, until he shall receive a warrant from the Governor of the State, or from the justices of the Supreme Court, directing the execution of such convict.⁵

The sheriff shall immediately transmit such inquisition to the Governor, who may, as soon as he shall be convinced of the sanity of such convict, issue a warrant appointing a time and place for his execution, pursuant to his sentence.⁶

By the common law, when a woman was convicted of a capital crime, she might allege pregnancy in delay of execution.⁷ By

¹ Post.

² 2 R. S., 658, § 16.

³ Id., § 18.

⁴ Id., § 19.

⁵ 2 R. S., 698, § 2.

⁶ Id., § 17.

⁷ 1 Hale P. C., 368; 2 Id., 406-413; 3 Inst., 17, 18; 2 Hawk. P. C., ch. 51, § 9; 4 Blac. Com., 395.

our statute, if a female convict, sentenced to the punishment of death, be pregnant, the sheriff shall, in like manner as above specified in cases of insanity, summon a jury of six physicians, and shall give the like notice to the district attorney, who shall attend, and have power to issue subpoenas as above provided, and with the like effect. An inquisition shall, in like manner, be made and signed by the jurors and the sheriff.¹

If, by such inquisition, it shall appear that such female convict is quick with child, the sheriff shall, in like manner, suspend the execution of her sentence, and shall transmit the inquisition to the governor; and whenever the governor shall be satisfied that such female convict is no longer quick with child, he shall issue his warrant appointing a day for her execution, pursuant to her sentence, or he may, at his discretion, commute her punishment to perpetual imprisonment in the State prison.²

The fact that a female defendant is quick with child, will not operate as a plea in bar at the trial, or as a cause for arresting the judgment, but can only be pleaded in stay of execution.³

When any insane convicts are imprisoned, a physician of a State prison is to certify that fact to the inspectors, who are thereupon to take proceedings to cause such convict to be conveyed to the State lunatic asylum for insane convicts.⁴

By a late statute, it is provided that no fine imposed by any court for any criminal offence shall be remitted or reduced, except upon an application made in open court, and upon proof that two days' notice, in writing, of such application, and copies of the papers upon which the same is founded, have been served upon the district attorney of the county in which the conviction was had, and by an order of the court, entered by the clerk thereof in its minutes.⁵

§ 137. OF THE DISQUALIFICATIONS CONSEQUENT UPON SENTENCE

Upon a person being sentenced by the court for the commission of a criminal offence, besides the duration of the term of imprisonment, there are certain disabilities and suspension of civil

¹ 2 R. S., 659, § 20.

² Id., §§ 21, 22.

³ 3 Inst., 17; 2 Hale P. C., 413; 1 Id., 368; 4 Blac. Com., 395.

⁴ 5th ed., R. S., vol. 2, p. 898, § 77.

⁵ Laws 1861, ch. 333, § 1, p. 781.

rights consequent thereon. The disqualifications consequent upon sentence, by which all the civil rights of the person sentenced are suspended commences, as does the running of the time of imprisonment from the moment of passing sentence.¹

A sentence of imprisonment in a State prison for any term less than a life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority or power during the term of such imprisonment.²

And a person sentenced to imprisonment in a State prison for life, shall thereafter be deemed civilly dead.³

No person sentenced upon a conviction for felony shall be incompetent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the Governor or by the Legislature, except in the cases specially provided by law; but no sentence upon an offence other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any case, matter or proceeding, civil or criminal.⁴

The Revised Statutes, however, have made an exception to the above rule by allowing convicts to testify in cases of offences committed on the persons of individuals, while imprisoned in a State or county prison.⁵

Petit larceny has been held not to be a felony within the provisions of the statute above referred to, and that consequently a conviction for that offence does not render the offender an incompetent witness, though it may be used by way of impeaching his credit.⁶

A person convicted of perjury, is an incompetent witness, though he has been pardoned by the Governor, and the pardon reports to restore him to all his civil rights, the Legislature having provided that such convict shall not be received as a witness till such judgment be reversed; but such incapacity to testify, is the result of a rule of evidence, and not a punishment of the offence.⁷

¹ *Miller v. Finkle*, 1 Park., 374.

² 2 R. S., 701, § 29.

³ 2 R. S., 701, § 30. For Hist. of the Doctrine of Civil Death. Vide 6 John., 118.

⁴ 2 R. S., 701, § 33.

⁵ R. S. 5th ed., vol. 3, p. 1101, § 179.

⁶ *Shay v. Peo.*, 4 Park., 353; *Carpenter v. Nixon*, 5 Hill, 260.

⁷ *Houghtaling v. Kelderhouse*, 1 Park., 241.

No conviction of any person for any offence whatever (except upon an outlawry for treason), shall work a forfeiture of any goods, chattels, lands, tenements, or hereditaments, or of any right or interest therein; and all forfeitures to the people of this State, in the nature of deodands, or in cases of suicide, or where any person shall flee from justice, are abolished.¹

The provisions of the statute in relation to bigamy do not extend to any person by reason of any former marriage with a husband or wife, who shall have been sentenced to imprisonment for life.²

The person of a convict sentenced to imprisonment in a State prison, is under the protection of the law, and any injury to his person not authorized by law, is punishable in the same manner as if he were not sentenced or convicted.³

Every person injured by the commission of any felony for which the offender shall be sentenced to imprisonment in a State prison, shall be deemed a creditor of such offender within the provisions of the second article of the first title of the fifth chapter of the Revised Statutes; and the amount of damages sustained by such injured person, shall be ascertained in a suit to be brought for that purpose by him against the trustees of the estate of such offender, who shall be appointed under the provisions of the said article.⁴

§ 138. COPIES OF SENTENCE, WHEN TO BE FURNISHED SHERIFF, AND HIS DUTY THEREON.

Whenever a sentence of imprisonment in a county jail shall be pronounced upon any person convicted of any offence, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, a transcript of the entry of such conviction in the minutes of the court, and of the sentence thereupon, duly certified by such clerk, which shall be a sufficient authority to such sheriff to execute such sentence, and he shall execute the same accordingly.⁵

When such convict shall be sentenced to imprisonment in State prison, the clerk of the court in which such sentence shall

¹ 2 R. S., 701, § 33.

² 2 R. S., 688, § 9, subdiv. 6.

³ 2 R. S., 701, § 31.

⁴ 2 R. S., 700, §§ 15, 16.

⁵ 2 R. S., 739, § 13.

be passed, shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person, or by a general and usual deputy, cause such convict to be transported to the proper prison, and delivered to the keeper thereof.¹

Such sheriff or deputy, whilst conveying a convict to the proper prison, has the same power and the like authority to require the assistance of any citizen of this State in securing such convict, and retaking him if he shall escape, as if such sheriff were in the county for which he was elected ; and all persons who shall refuse or neglect to assist such sheriff when required, shall be liable to the same penalties as if such sheriff were in his own county.²

Whenever any convict shall be delivered to the warden of the State prison, the officer having such convict in his charge, shall deliver to such warden the certified copy of the sentence received by such officer from the clerk of the court by which such convict shall have been sentenced, and take from the warden a certificate of the delivery of such convict.³

All the convicts who shall be sentenced to imprisonment in the same State prison, or to the same house of refuge, at one session of a criminal court, shall be transported at the same time, unless said court shall expressly direct otherwise.⁴

§ 139. ENTERING JUDGMENT IN THE MINUTES.

Whenever a judgment upon any conviction shall be rendered in any court, it shall be the duty of the clerk thereof to enter such judgment fully in his minutes, stating briefly the offence for which such conviction shall have been had, and the court shall inspect such entries, and conform them to the facts.⁵

And it shall be the duty of the district attorney, upon being required by the clerk, to prepare for him a statement of the offence of which any person shall be convicted, as the same is charged in the indictment, to be entered in the minutes of such clerk ; but the court shall inspect the same, and conform it to the indictment.⁶

¹ 2 R. S., 739, § 14.

² Idem, § 15.

³ 2 R. S., 5th ed., vol. 3, p. 1089, § 101.

⁴ Laws 1847, ch. 497, § 5 ; 2 R. S., 752, § 20.

⁵ 2 R. S., 738, § 5.

⁶ Idem, § 6.

Upon a conviction at the oyer and terminer, it was held not sufficient to state in the entry of judgment in the minutes, that the defendant was convicted of a felony or misdemeanor, but the particular offence should be stated; and where a person is imprisoned under such conviction, the particular kind of offence of which he has been convicted, should appear in the commitment, that it may be seen whether the punishment awarded was warranted by the offence.¹

But upon a review of the same case, the Kings' general term held that it was sufficient to state in the entry of the judgment in the minutes, that the defendant was convicted of a misdemeanor, and that a more particular description of the offence need not be stated, neither was a more particular description of the offence needed in the warrant of commitment.²

§ 140. RECORDS OF JUDGMENT.

Whenever any defendant who shall have been acquitted or convicted upon any indictment, shall require the district attorney to make up a record of the judgment, it shall be his duty to do so on being paid the fees allowed by law for such service; and if such district attorney shall neglect, for ten days after being so required to make up such record, such defendant may himself cause the same to be made up, signed and filed.³

In cases of nuisance on or near the boundary lines of the counties of New York, Westchester and Queens, the record of conviction is to be filed in the county in which the nuisance is located although the conviction shall be had in either of the other counties affected injuriously thereby.⁴

The judgment record need not state the constant presence of the prisoner during the trial.⁵

§ 141. OF THE PUNISHMENT.

It was said by an ancient philosopher, that criminals are punished, not because they have offended; for what is done, can never be undone, but that for the future, the criminals themselves, a

¹ *Peo. v. Cavanagh*, 1 Park., 588.

² *Id.*, 2 Park., 650.

³ 2 R. S., 738, § 4.

⁴ 2 R. S., 728, § 52; *Laws 1851*, ch. 415, § 2.

⁵ *Stephens v. Peo.*, 19 N. Y., 549.

such as see their punishment, may take warning, and learn to shun the allurements of vice.¹

The several courts of justice, organized under the Constitution and laws of this State, are declared by statute to possess the sole and exclusive jurisdiction, as well of punishing, as of trying in the manner prescribed by law, all persons, as well Indians, as others, for offences and crimes committed within the boundaries of this State, excepting only such as are cognizable by the courts deriving their jurisdiction under the laws and Constitution of the United States.²

The punishment inflicted upon offenders against our laws, are death, imprisonments in a State prison, county jail or penitentiary, the payment of money by way of fine, and disqualification from holding public offices, trusts or appointments.

At the common law, many offences, now punishable upon conviction by simple imprisonment, were punishable by death; and many cruel and unusual punishments, unknown to our law, were inflicted upon offenders. Our statutes, however, in the chapter devoted to crimes and their punishments, declares that all punishments prescribed by the common law, for any offence specified in that chapter, and for the punishment of which provision is therein made, are prohibited.³

The felonies of which the term of punishment is given in the next section, are, with a few exceptions, included in the chapter of the statutes above referred to; and from a note of the revisers to the section of the statute above referred to, it was their intention to include in that chapter every known offence of a higher grade than a misdemeanor.⁴

§ 142. OF THE PUNISHMENT FOR FELONIES.

Prior to the passage of the act of 1865, the term of punishment for felonies in this State, by imprisonment in a State prison, had a wide range; the extent of such punishment being for life, and the lowest term, two years. The statute declaring that, where the offence was declared punishable, upon conviction, by imprisonment in a State prison for a term not less than any speci-

¹ Plato Liv. Hist., L. 1, ch. 28.

² 2 R. S., 698, § 1.

³ 2 R. S., 701, § 17.

⁴ Revisers' Notes, part 4, p. 89.

fied number of years, and no limit to the duration of such punishment was declared, the court, authorized to pronounce judgment upon such conviction, might, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than such as were prescribed; but that no person should, in any case, be sentenced to imprisonment in a State prison for any term less than two years.¹ The Legislature, in 1862, by the passage of an act,² undoubtedly intended to lessen the shortest duration of imprisonment from two years to one year, but, evidently by a clerical error, amended the next succeeding section to the one intended.³

The act of 1865, however, introduced a sweeping reform into the duration of imprisonments in a State prison, as a punishment upon convictions for felonies. The act is given entire, as follows:

"SECTION 1. All criminal offences now punished by imprisonment in the State prison, for a term not less than two nor more than five years, shall hereafter be punished by imprisonment in the State prison for a term not less than one nor more than five years.

"SECTION 2. All criminal offences now punished by imprisonment in the State prison, for a term not less than five nor more than ten years, shall hereafter be punished by imprisonment in the State prison for a term not less than two nor more than ten years.

"SECTION 3. All criminal offences (except murder in the second degree, arson and manslaughter in the first degree), now punished by imprisonment in the State prison for a term not less than five nor more than twenty years, shall hereafter be punished by imprisonment in the State prison for a term not less than five nor more than twenty years."⁴

¹ 2 R. S., 700, § 12.

² Laws 1862, ch. 417, § 1, p. 748.

³ Id., 2 R. S., 700, §§ 12, 13.

⁴ Laws 1865, ch. 212, p. 347.

Immediately following will be found a synopsis of the punishments for different felonies; the duration of imprisonment being given as provided for by the Revised Statutes and Session Laws previous to the passage of the act of 1865. The reader will, therefore, bear in mind the necessity, at the same time, of constantly referring to the provisions of the act cited above, in determining the duration of the imprisonment. A comparison of the punishments given below with the act of 1865 will show, at a glance, the limits of the punishment which can now be inflicted, bearing in mind, however, that the lowest punishment allowed by the Revised Statutes was two years, and that now, in cases where the punishment was originally stated at not more than five years, the lowest limit may therefore now be one year by the first section of the act of 1865, as well as in those cases where it was specially designated as not more than five or less than two years.

ARSON.

FIRST DEGREE.—Imprisonment in State prison not less than ten years.

SECOND DEGREE.—Like imprisonment, not more than ten nor less than seven years.

THIRD DEGREE.—Like imprisonment, not more than seven nor less than four years.

FOURTH DEGREE.—Like imprisonment, not more than four years nor less than one year, or by imprisonment in a county jail not exceeding one year. (Laws 1862, ch. 197, p. 368.)

ABDUCTING FEMALE, UNDER TWENTY-FIVE YEARS, FOR PROSTITUTION.

Imprisonment in a State prison not exceeding two years, or imprisonment in county jail not exceeding one year. (Laws 1848, ch. 105, p. 118.)

(See "Compelling women to marry.")

ACCEPTING A BRIBE. (See "Bribery.")**ACCESSORY BEFORE THE FACT.** (See section 145, post, page 413.)**ADMINISTERING POISON.** (See "Poison.")**AIDING ESCAPE.** (See "Escape.")**ALTERING RECORDS.** (See "Forgery.")**ASSAULTS WITH INTENT TO COMMIT FELONIES.**

Imprisonment in a State prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment. (2 R. S., 666, § 41.)

ABDUCTION FOR PROSTITUTION, ETC., UNDER FOURTEEN YEARS.

Imprisonment in a State prison not exceeding three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. (2 R. S., 664, § 28.)

ARMED AT NIGHT WITH DANGEROUS WEAPONS, PICK-LOCKS, ETC.

(See "Second offence.")

ATTEMPTS TO COMMIT OFFENCES. (See section 147, post, page 413.)**ABANDONING CHILDREN UNDER SIX YEARS OLD.**

Imprisonment in State prison not exceeding seven years, or in a county jail not more than one year. (2 R. S., 665, § 37.)

ASSAULTS WITH DEADLY WEAPONS WITH INTENT TO KILL, ROB, ETC.

Imprisonment in State prison not more than ten years. (2 R. S., 665, § 38.)

ASSISTING PRISONERS TO ESCAPE.

Persons giving prisoners, confined on conviction or charge for felony, arms or disguises to aid in escape, imprisonment in State prison not exceeding ten years. (2 R. S., 684, § 16.)

Aiding prisoner to escape, imprisoned for felony, or charge of felony, punished by imprisonment in State prison not exceeding ten years. (Id., § 17.)

When the aid or assistance is rendered by another prisoner in the same place of confinement, his punishment is not to exceed that prescribed by law for his own offence. (Id., § 19.)

Aiding prisoner to escape from officer, imprisonment in county jail not exceeding one year, or fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment. (Id., 20.)

ASSAULT WITH DANGEROUS WEAPONS.

Imprisonment in State prison not more than five years, or by imprisonment in county prison not exceeding one year. (2 R. S., 689, § 24.)

BIGAMY.

Imprisonment in the State prison not exceeding five years. (2 R. S., 687, § 8.)

Single persons marrying wife or husband of another, imprisonment in a State prison not more than five years, or in a county jail not more than one year, or fine not more than five hundred dollars, or both such fine and imprisonment, in the discretion of the court. (2 R. S., 688, § 11.)

BRIBERY.

Bribing officers, imprisonment in a State prison not exceeding ten years, or fine not exceeding five thousand dollars, or both, in the discretion of the court. (2 R. S., 682, § 9.)

Officer accepting bribes is punishable by imprisonment in State prison not exceeding ten years, or by fine not exceeding five thousand dollars, or both, in the discretion of the court, and disqualified from holding office. (Id., § 10.)

Juror accepting bribes, imprisonment in State prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Id., § 11.)

Persons assisting principal offenders in bribery are punished to the same extent as principal offenders, except disqualification and forfeiture of office. (Id., § 13.)

Corrupting jurors, &c., imprisonment in a State prison not exceeding five years, or in a county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Id., § 12.)

BURGLARY.

FIRST DEGREE.—Imprisonment in a State prison for a term not less than ten years.

SECOND DEGREE.—Like imprisonment, not more than ten nor less than five years.

THIRD DEGREE.—Like imprisonment, not exceeding five years. (2 R. S., 669, § 21.)

BUYING STOLEN PROPERTY.

Imprisonment in a State prison for a term not exceeding five years, or in the county jail not exceeding six months, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment. (2 R. S., 680, § 73.)

COMPOUNDING FELONIES.

Where felony, punishable by death or State prison for life, punishment is imprisonment in a State prison not exceeding five years, or in a county jail not exceeding one year.

Where the offence is punishable by imprisonment in a State prison for less than life, the punishment for compounding such offence is imprisonment in a State prison not exceeding three years, or in a county jail not exceeding six months. (2 R. S., 689, §§ 17, 18.)

CARNAL KNOWLEDGE OF WOMAN WITHOUT HER CONSENT BY DRUGS, ETC.

Imprisonment in State prison not exceeding five years. (2 R. S., 663, § 23.)

COMPELLING WOMAN TO MARRY, ETC.

Imprisonment in State prison not less than ten years. (2 R. S., 663, § 24.)

Taking woman for such purpose, imprisonment in State prison not less than ten years. (Idem.)

CONSPIRACY. (See "Disguised Persons.")**CRIME AGAINST NATURE.**

Imprisonment in a State prison not more than ten years. (2 R. S., 689, § 20.)

CAUSING INJURY OR DEATH FROM EXPLOSIONS OF SALTPETRE OR GUNPOWDER.

Imprisonment in State prison not exceeding two years. (2 R. S., 666, § 42; Laws 1846, ch. 291, § 16.)

If violation of act cause death, then punished as for manslaughter in third degree.

CHALLENGING TO FIGHT A DUEL. (See "Dueling.")**CONNIVING AT ESCAPE OF PRISONERS. (See "Escapes.")****CORRUPTING JURORS. (See "Bribery.")****COUNTERFEITING COIN, &C., AND SELLING AND UTTERING COUNTERFEIT NOTES. (See "Forgery.")****CONCEALED WEAPONS, SLUNG SHOTS, AIR GUNS, ETC.**

Imprisonment in State prison, penitentiary or county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment. (Laws 1866, ch. 716, p. 296.)

CAUSING DEATH BY WRONGFUL ACT OF ENGINEERS, CONDUCTORS, ETC.

Imprisonment in State prison not exceeding five years, or county jail not exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment. (Laws 1849, ch. 256, § 2, p. 389.)

COUNTERFEITING BRANDS, &C., IN RELATION TO SALT WORKS.

Imprisonment in State prison not less than three nor more than six years. (Laws 1859, ch. 346, p. 807, § 93.)

DECOYING CHILDREN.

Imprisonment in State prison not exceeding ten years, or by imprisonment in county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. (2 R. S., 665, § 36.)

DESTROYING RECORDS BY PUBLIC OFFICERS.

Imprisonment in State prison not exceeding five years. (2 R. S., 680, § 72.)

DUELLING AND CHALLENGES TO FIGHT.

Fighting a duel, imprisonment in a State prison not exceeding ten years and disqualification from office. (2 R. S., 686, §§ 1-4.)

DUELING AND CHALLENGES TO FIGHT.—(Continued.)

Sending challenges, &c., imprisonment in a State prison not exceeding seven years. (Id., § 2.)

Inhabitants leaving the State for the purpose of eluding the provisions of the act against dueling, the like punishment as if offence had been committed in the State. (Id., § 5.)

DISGUISED PERSONS COMMITTING CONSPIRACY, RIOT, OR OTHER MISDEMEANOR.

Imprisonment in county jail not exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment, or by imprisonment in the State prison for two years, in the discretion of the court. (2 R. S., 689, § 23; Laws 1845, ch. 3, § 7.)

ENLISTMENT, DRUGGING TO PRODUCE.

Imprisonment in a State prison not exceeding five years, nor less than two years. (Laws 1854, ch. 391, § 2, p. 890.)

ENLISTED PERSONS, DEFAUDING.

Like punishment. (Id., § 1.)

EMBEZZLEMENT.

Punishment in the manner prescribed by law for feloniously stealing the articles embezzled, or the value of the money, payable and due upon any right in action embezzled. (See "Larceny." 2 R. S., 678, § 61.)

EMBEZZLEMENT BY CARRIERS.

Punished in the manner prescribed by law for feloniously stealing property of the value of the advance so converted, or applied or secreted. (Laws 1855, ch. 729, p. 1450.)

ESCAPE FROM STATE PRISON.

Punished by imprisonment in such prison for a term not to exceed five years, to commence from and after his original term of imprisonment. (2 R. S., 685, § 24.)

Prisoner escaping from county jail by breaking the same, punished by imprisonment in a State prison, not exceeding two years, or in a county jail not exceeding one year, to commence from the expiration of his former sentence. (2 R. S., 685, § 25.)

Convict in State prison, attempting to escape by force, and violence to any person, punished by imprisonment in State prison, not to exceed five years. (Id., § 26.)

Prisoner in county jail, forcibly breaking prison with intent to escape, or attempting so to do, punishment in a county jail not exceeding one year. (Id., § 27.)

FORGERY.

FIRST DEGREE.—Imprisonment in a State prison not less than ten years.

SECOND DEGREE.—Like imprisonment, not more than ten nor less than five years.

THIRD DEGREE.—Like imprisonment, not exceeding five years.

FOURTH DEGREE.—Like imprisonment, not exceeding two years, or by imprisonment in county jail not exceeding one year. (2 R. S., 675, § 42.)

Forgery of railroad tickets, punishable as forgery in the third degree. (2 R. S., 680, § 78.)

Having such forged tickets in one's possession, etc., punishable as in the fourth degree. (Id., § 79.)

FALSELY PERSONATING OTHERS.

Imprisonment in a State prison for a term not exceeding ten years. (2 R. S., 676, § 50.)

FALSELY PERSONATING AND RECEIVING MONEY.

Punishment in the same manner, and to some extent, as for larceny of the money or property so received. (See "Larceny." 2 R. S., 676, § 52.)

LSE TOKENS AND PRETENCES.

Imprisonment in a State prison not exceeding three years, or imprisonment in a county jail, not exceeding one year, or by fine not exceeding three times the value of the property, money or thing so obtained, or by both such fine and imprisonment. (2 R. S., 677, § 55.)

If the false token be promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any banking company or moneyed corporation not in existence, the punishment is imprisonment in a State prison not exceeding seven years. (2 R. S., 677, § 56.)

LSE ENTRIES AND FALSE CERTIFICATES. (See "Forgery.")

AUDULENT ISSUE OF STOCKS AND BONDS OF CORPORATIONS.

Issue, etc., of fraudulent bonds, imprisonment in State prison not less than three nor more than seven years, and fine not exceeding three thousand dollars.

Issue, etc., of fraudulent certificates of stock, etc., like punishment. (Laws 1855, ch. 155, p. 236.)

MBLERS (as defined by act of 1851, amended by Laws of 1855).

Not less than ten days' hard labor in the penitentiary, or not more than two years' hard labor in the State prison, and to be fined in any sum not more than one thousand dollars; the money to be divided among the school districts in the county. (Laws 1851, ch. 504, § 2; amended by Laws of 1855, ch. 214.)

VEIGLING PERSONS TO GAMING HOUSES.

Same punishment. (Id., § 7.)

CEST.

Imprisonment in a State prison not exceeding ten years. (2 R. S., 688, 2.)

JURY TO RAILROADS. (See "Malicious Injury," etc.)

DNAPPING.

Imprisonment in a State prison not exceeding ten years. (2 R. S., 664, § 30.)

Accessories after the fact to kidnapping, punished by imprisonment in State prison not exceeding six years, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. (2 R. S., 665, § 33.)

Selling blacks kidnapped, imprisonment in State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Id., § 34.)

RCENY, GRAND.

Imprisonment in a State prison not exceeding five years. (2 R. S., 679, § 65; Laws 1862, ch. 417, § 1.)

If in a dwelling house, ship or vessel, three years in addition. (2 R. S., 679, § 66.)

If in the night time, from the person of another, imprisonment in a State prison not exceeding ten years. (Id., § 67; Laws 1862, ch. 417.)

Stealing records, imprisonment in a State prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. (2 R. S., 680, § 71.)

Stealing railroad tickets, punishable as grand or petit larceny, according to the price charged for them. (2 R. S., 680, §§ 75, 76.)

Larceny from the person, though less than twenty-five dollars in amount, is punished the same as grand larceny, and attempts, under similar circumstances, same as grand larceny. (Laws 1862, ch. 374, p. 627.)

MANSLAUGHTER.

FIRST DEGREE.—Imprisonment in a State prison, not less than seven years.

SECOND DEGREE.—Like imprisonment, not less than four nor more than seven years.

THIRD DEGREE.—Like imprisonment, not more than four nor less than two years.

FOURTH DEGREE.—Like imprisonment, for two years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (2 R. S., 663, § 20.)

MURDER.

FIRST DEGREE.—Death.

SECOND DEGREE.—Imprisonment in a State prison for a term of not less than ten years. (Laws 1862, ch. 197, p. 368.)

MAYHEM.

Imprisonment in State prison for such term as the court shall prescribe, not less than seven years. (2 R. S., 664, § 29.)

MALICIOUS INJURY TO RAILROADS.

Imprisonment in a State prison not exceeding five years, or in a county jail not less than six months. (2 R. S., 689, § 21.)

MOCK AUCTIONS, FRAUD AND DECEITFUL PRACTICES.

State prison not more than three years, or in the county jail not exceeding one year, or fine not exceeding one thousand dollars, or by both such fine and imprisonment. (1 R. S., 535, § 59; Laws 1853, ch. 138, § 2.)

MASQUERADES IN NEW YORK CITY AND BROOKLYN.

Fine not less than two thousand five hundred dollars, or by imprisonment in State prison not less than six, and not more than twenty-four months, or both. (Laws 1829, ch. 270, amended by Laws 1858, ch. 359, p. 627—)

PERJURY.

Is punishable by imprisonment in State prison, as follows:

If committed on the trial of an indictment for capital offence, or other felony, not less than ten years.

On any other judicial trial or inquiry, not exceeding ten years. (2 R. S., 681, § 2.)

POISON, EXPOSING TO CATTLE.

Imprisonment in a State prison not exceeding three years, or in a county jail not exceeding one year, or fine not exceeding two hundred and fifty dollars, or both such fine and imprisonment. (2 R. S., 689, § 16.)

PRODUCING PRETENDED HEIR.

Imprisonment in a State prison not exceeding ten years. (2 R. S., 676, § 54.)

POISON, ADMINISTERING TO HUMAN BEINGS.

Imprisonment in a State prison not less than ten years. (2 R. S., 686, § 39.)

POISONING FOOD, SPRINGS, ETC.

Imprisonment in a State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. (2 R. S., 666, § 40.)

PASSENGER TICKETS ON VESSELS.

Violations of provisions of first three sections of act punished by imprisonment in a State prison for a term not more than two years, or by imprisonment in a county jail not less than six months. (Laws 1860, ch. 103, § 4.)

SELLING TICKETS NOT PROPERLY FILLED OUT, ETC.

Imprisonment in a State prison not exceeding two years, or by a fine not exceeding one thousand dollars. (Id., § 11.)

SELLING TICKETS NOT PROPERLY FILLED OUT, ETC.—(Continued.)

Violation of fifth section is punished by imprisonment in State prison not exceeding five years. (Id., § 5.)

ROBBERY.

FIRST DEGREE.—Imprisonment in a State prison for a term not less than ten years.

SECOND DEGREE.—Like imprisonment, not exceeding ten years. (2 R. S., 678, § 59.)

RECEIVING EMBEZZLED PROPERTY.

To the same extent as a servant for embezzlement. (2 R. S., 678, § 63. See "Embezzlement and Larceny.")

RAPE.

Imprisonment in State prison not less than ten years. (2 R. S., 663, § 22.)

RECEIVING STOLEN GOODS.

Imprisonment in State prison not exceeding five years, or in county jail not exceeding six months, or by fine of two hundred and fifty dollars, or both such fine and imprisonment. (R. S., 680, § 73.)

REGISTRY LAW, VIOLATIONS OF.

Imprisonment in State prison not less than one year. All false swearing before boards of registry punished as perjury. (Laws 1859, ch. 380, p. 895, § 14.)

SEDUCTION UNDER PROMISE OF MARRIAGE.

Imprisonment in a State prison not exceeding five years, or by imprisonment in county jail not exceeding one year. (2 R. S., 664, § 26.)

SUBORNATION OF PERJURY.

Is punished the same as prescribed upon a conviction for the perjury which shall have been so procured. (2 R. S., 681, § 4.)

Attempt to induce perjury is punished by imprisonment in a State prison not exceeding five years. (2 R. S., 682, § 8.)

SUBSTITUTING CHILD, ETC.

Imprisonment in a State prison not exceeding seven years. (2 R. S., 677, § 54.)

SECOND OFFENCES. (See sections 148, 149, post, pages 414, 415.)

SELLING COUNTERFEIT NOTES. (See "Forgery.")

SEVERING FROM THE SOIL, PRODUCE, ETC., UPWARDS OF TWENTY-FIVE DOLLARS IN VALUE.

Punishment same as grand Larceny. (2 R. S., 680, § 70.)

SODOMY. (See "Crime Against Nature.")

STEALING RAILROAD TICKETS. (See "Larceny.")

TREASON AGAINST THE PEOPLE OF THIS STATE.

Punishment, death. (Laws 1862, ch. 197, p. 368.)

TAKING FEMALES UNDER FOURTEEN YEARS FOR PROSTITUTION, ETC.

Imprisonment in a State prison not exceeding three years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (2 R. S., 664, § 28.)

THREATENING LETTERS.

Imprisonment in a State prison not exceeding five years. (2 R. S., 678, § 60.)

UTTERING COUNTERFEITS. (See "Forgery.")

VIOLATING GRAVE, ETC.

Imprisonment in State prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. (2 R. S., 688, § 13.)

VIOLATING GRAVE, ETC.—(Continued.)

Purchasing dead human bodies, etc., like punishment. (Id., § 14.)

Opening graves to remove bodies or steal coffins, etc., imprisonment in a State prison not exceeding two years, or in a county jail not exceeding six months, or by fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment. (2 R. S., 689, § 15.)

VOTING.

Inhabitants of other States voting in this State at elections, imprisonment in State prison not exceeding one year. (Laws 1839, ch. 389, § 14, p. 365.)

§ 143. PUNISHMENT FOR MISDEMEANORS.

It is prescribed that every person who shall be convicted of any misdemeanor, the punishment of which is not prescribed by some statute, shall be imprisoned by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.¹

It is further provided by statute that the court before whom any person shall be convicted of an offence punishable by imprisonment in a county jail, may sentence such person to be imprisoned in a solitary cell in such jail, if any such be erected, but such imprisonment shall in no case exceed thirty days in the whole.²

There is also another provision of the statute that upon conviction for any offence punishable by imprisonment in a jail or prison, in relation to which no fine is prescribed, the court may impose a fine on the offender not exceeding two hundred dollars.³

The misdemeanors made such by statute are so numerous and varied that in the cases where the punishment is prescribed by statute for the specific offence, the duration and manner of punishment will best be ascertained by consulting the statute creating the offence and providing for the punishment.

A sentence to pay a fine for a misdemeanor is valid though it is not added that the defendant stand committed until the fine is paid. The prosecutor may complain of such omission, but the defendant cannot.⁴

§ 144. SURETY OF THE PEACE MAY BE REQUIRED OF CONVICT IN ADDITION TO PUNISHMENT.

Every court of criminal jurisdiction, before which any person shall be convicted of any criminal offence not punishable by

¹ 2 R. S., 697, § 55.

² 2 R. S., 700, § 14.

³ 2 R. S., 697, § 56.

⁴ Kane v. Peo., 8 Wend., 203.

death or imprisonment in a State prison, shall have power, in addition to such sentence as may be prescribed or authorized by law, to require such person to give security to keep the peace or to be of good behavior, or both, for any term not exceeding two years, or to stand committed until such security is given. But the above provision does not extend to convictions for writing or publishing any libel, nor shall any such security be required by any court upon any complaint, prosecution or conviction for any such writing or publishing. No recognizance, given under the last section, shall be deemed to be broken unless the principal therein be convicted of some offence amounting, in judgment of law, to a breach of such recognizance; and the same proceedings, for the collection of such recognizance when forfeited, shall be had as are prescribed by the Revised Statutes in relation to recognizances to keep the peace.¹

§ 145. PUNISHMENT OF ACCESSORIES BEFORE THE FACT AND PRINCIPALS IN THE SECOND DEGREE.

Every person who shall be a principal in the second degree in the commission of any felony, or shall be an accessory to a murder before the fact, and every person who shall be an accessory to any felony before the fact, shall, upon conviction, be punished in the same manner as is prescribed in the statutes with respect to principals in the first degree.²

§ 146. PUNISHMENT OF ACCESSORIES AFTER THE FACT.

They are punished by imprisonment in a State prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.³

§ 147. PUNISHMENT FOR ATTEMPTS TO COMMIT OFFENCES.

Every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision

¹ 2 R. S., 738, §§ 1, 2, 3.

² 2 R. S., 699, § 6.

³ 2 R. S., 699, § 7.

is made by law for the punishment of such offence, be punished as follows :

1. If the offence attempted to be committed be such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in a State prison not exceeding ten years.

2. If the offence so attempted be punishable by imprisonment in a State prison for four years or more, or by imprisonment in a county jail, the person convicted of such attempt shall be punished by imprisonment in a State prison or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed for a conviction for the offence so attempted.

3. If the offence so attempted be punishable by imprisonment in a State prison for a term less than four years, the person convicted of such attempt shall be sentenced to imprisonment in a county jail for not more than one year.

4. If the offence so attempted be punishable by a fine, the offender convicted of such attempt shall be liable to a fine not exceeding one-half of the largest amount which may be imposed upon a conviction of the offence so attempted.

5. If the offence so attempted be punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half of the longest time of imprisonment, and one-half of the greatest fine which may be imposed upon a conviction for the offence so committed.¹

Attempts at pocket-picking are punished as attempts at grand larceny.²

§ 148. PUNISHMENT OF PERSONS COMMITTING SECOND OFFENCE AFTER PREVIOUS CONVICTION FOR A FELONY.

If any person, convicted of any offence punishable by imprisonment in a State prison, shall be discharged, either upon being pardoned or upon the expiration of his sentence, and shall subsequently be convicted of any offence committed after such pardon or offence, he shall be punished as follows :

1. If the offence of which such person shall be subsequently

¹ 2 R. S., 698, § 3. Vide 4 Hill, 134; 1 Park., 459.

² Laws 1862, ch. 374, § 2, p. 627.

convicted be such that, upon a first conviction, an offender would be punishable by imprisonment in a State prison for any term exceeding five years, then such person shall be punished by imprisonment in a State prison for a term not less than ten years.

2. If such subsequent offence be such that, upon a first conviction, the offender would be punishable by imprisonment in a State prison for five years or any less term, then the person convicted of such subsequent offence, shall be punished by imprisonment in a State prison for a term not exceeding ten years.

3. If such subsequent conviction be for petit larceny, or for any attempt to commit an offence which, if committed, would be punishable by imprisonment in a State prison, then the person, convicted of such offence, shall be punished by imprisonment in a State prison for a term not exceeding five years.¹

Any woman who shall be convicted a second time of concealing the death of a child, which, if born alive, would be a bastard, shall be imprisoned in a State prison for a term of not less than two nor more than five years.²

Persons found armed at night with dangerous weapons, with felonious intent to break and enter any dwelling house, building, room in a building, cabin, state-room, railway car, or other covered enclosure where personal property shall be, with intent to commit larceny, or other felony, or who are found at night with pocketlocks, nippers, &c., in their possession, with the intent aforesaid, or in any dwelling house, building or place where personal property shall be, with intent to commit larceny or felony therein, may be punished by imprisonment in a State prison not to exceed five years for a second offence therefor.³

149. PUNISHMENT OF PERSONS COMMITTING SECOND OFFENCE AFTER PREVIOUS CONVICTION FOR PETIT LARCENY, OR FOR CERTAIN ATTEMPTS TO COMMIT OFFENCES.

Every person having been convicted of petit larceny, or of an attempt to commit an offence which, if perpetrated, would be punishable by imprisonment in a State prison; and, having been pardoned or otherwise discharged, who shall be subsequently

¹ 2 R. S., 699, § 8.

² 2 R. S., 694, § 23.

³ Laws 1862, ch. 374, p. 627.

convicted of any offence, committed after such pardon or discharge, shall be punished as follows:

1. If such subsequent offence be such that, upon a first conviction the offender would be punishable in a State prison for life, at the discretion of the court, then such person shall be sentenced to imprisonment in such prison during life.

2. If such subsequent offence be such that, upon a first conviction, the offender would be punishable by imprisonment in a State prison for any term less than life, then such person shall be sentenced to imprisonment, in such prison, for the longest term prescribed upon conviction for such first offence.

3. If such subsequent conviction be for petit larceny, or for any attempt to commit an offence which, if perpetrated, would be punishable by imprisonment in a State prison, then such person shall be sentenced to imprisonment in such prison for a term not exceeding five years.¹

The statute declaring a second offence of petit larceny to be punishable in the State prison, is not applicable to a case in which the first conviction took place in another State.²

Under the act of 1862, persons who are convicted for being found armed at night with dangerous weapons, picklocks, and other instruments of burglary, with felonious intent, as mentioned in the act, after a previous conviction for felony, petit larceny, or such offence as is described in the act, are to be deemed guilty of a felony, and to be punished by imprisonment in a State prison not to exceed five years.³

The second offence, by a woman, of endeavoring secretly to conceal the death of any issue of her body which, if born alive, would by law be a bastard, whether it was born dead or alive, or whether it was murdered or not, is a felony, and punishable by imprisonment in a State prison not more than five years.⁴

§ 150. PUNISHMENT OF PERSONS CONVICTED IN THIS STATE AFTER PREVIOUS CONVICTIONS IN OTHER STATES OR FOREIGN COUNTRIES.

Every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in an

¹ 2 R. S., 700, § 9. Vide Laws 1862, ch. 374, ante.

² *Peo. v. Cæsar*, 1 Park., 645. Vide 3 Id., 330.

³ Laws 1862, ch. 374, § 1, p. 627. ⁴ 2 R. S., 694, § 23.

foreign country, of an offence which, if committed in this State, would be punishable by the laws of this State by imprisonment in a State prison shall, upon conviction for any subsequent offence committed in this State, be subject to the punishment prescribed by the Revised Statutes, upon subsequent convictions in the same manner, and to the same extent, as if such first conviction had taken place in a court in this State.¹

§ 151. PERSONS CONFINED FOR FINES, WHEN DISCHARGED IF UNABLE TO PAY FINE.

Whenever any person shall be confined in any county prison for the non-payment of any fine not exceeding two hundred and fifty dollars, imposed for any criminal offence, and against whom no other cause of detention shall exist, on satisfactory proof made to the county court of the county in which such person may be confined, that he is unable, and has been ever since his conviction, unable to pay such fine, the court may, in its discretion, order his discharge.²

§ 152. ENFORCEMENT OF FINES AGAINST CORPORATIONS.

Whenever a fine shall be imposed upon any corporation, the same may be collected by *distringas* against their personal estate and chattels real.³

¹ 2 R. S., 700, § 10.

² 2 R. S., part IV, ch. 3, tit. 1, art. 2, § 28.

³ 2 R. S., 747, § 44.

SECTION V.

OF SUBSEQUENT MISCELLANEOUS PROCEEDINGS.

- Section CLIII.—OF THE EXECUTION OF THE DEATH SENTENCE.
 CLIV.—REPRIEVE OF CONVICTS.
 CLV.—APPLICATION FOR PARDON.
 CLVI.—OF MAKING AND FILING STATEMENTS OF CONVICTION.
 CLVII.—DISTRICT ATTORNEY TO FURNISH STATEMENT OF CONVICTION.
 CLVIII.—DUTY OF THE CLERK THEREON.
 CLIX.—ADDITIONAL STATEMENT IN RELATION TO INDICTMENTS TO BE MADE BY CLERK OF COURT.
 CLIX.—STATEMENT TO BE MADE BY SHERIFF IN RELATION TO CONVICTIONS.
 CLXI.—DISTRICT ATTORNEY TO FILE MINUTES OF EVIDENCE.
 CLXII.—ORDERS OF CONTINUANCE.

§ 153. OF THE EXECUTION OF THE DEATH SENTENCE.

The proceedings upon a warrant for execution are provided for by the Revised Statutes, and are as follows:

Whenever any convict shall be sentenced to the punishment of death, the court, or a major part thereof, of whom the presiding judge shall always be one, shall make out, sign and deliver to the sheriff of the county a warrant, stating such conviction and sentence, and appointing the day on which such sentence shall be executed; such day shall not be less than four weeks and not more than eight weeks from the time of the sentence. The presiding judge of the court, at which such conviction shall have taken place, shall immediately thereupon transmit to the Governor of the State, by mail, a statement of such conviction and sentence, with the notes of the testimony taken by such judge on the trial. The Governor is authorized to require the opinion of the judges of the Court of Appeals, justices of the Supreme Court, and of the Attorney-General, or of any of them, upon any statement so furnished.¹

The punishment of death is, in all cases, to be inflicted by hanging the convict by the neck until he be dead.² And the punishment is to be inflicted within the walls of the prison of the county in which such conviction shall have taken place, or within a yard or inclosure adjoining said prison.³

It is also made the duty of the sheriff, or under sheriff, of the county to be present at the execution, and to invite the presence, by at least three days' previous notice, of the judges, district attorney

¹ 2 R. S., §§ 11, 12, 13, 14; Laws 1847, ch. 328.

² 2 R. S., 659, § 25.

³ Id., § 26; Laws 1835, ch. 258.

erk, and surrogate of the county, together with two physicians, and twelve reputable citizens, to be selected by said sheriff, or under sheriff, and the said sheriff, or under sheriff, at the request

the criminal, shall permit such minister or ministers of the Gospel, not exceeding two, as said criminal shall name, and any

the immediate relatives of said criminal to attend and be present at such execution, and also such officers of the prison, deputies, and constables as said sheriff or under sheriff shall deem expedient to have present; but no other persons than those above mentioned shall be permitted to be present at such execution, nor shall any person under age be permitted to witness the same.¹

The sheriff, or under sheriff, and judges attending such execution, are to prepare and sign officially a certificate setting forth the time and place thereof, and that such criminal was then and there executed, in conformity to the sentence of the court and the provisions of the statute, and shall procure to said certificate the signatures of the other public officers and persons, not relatives of the criminal, who witnessed such execution; and the sheriff, or under sheriff, is to cause the said certificate to be filed in the office of the clerk of the county, and a copy thereof to be published in the State paper, and in one newspaper, if any printed, in said county.²

The execution of the sentence may be stayed by reason of insanity or pregnancy of the convict;³ and whenever for any reason any convict, sentenced to the punishment of death, shall not have been executed pursuant to such sentence, and the same shall stand in full force, the Supreme Court, on the application of the Attorney General or of the district attorney of the county where the conviction was had, shall issue a writ of *habeas corpus* to bring such convict before such court, or, if he be at large, a warrant for his apprehension may be issued by the said court or any justice thereof;⁴ and, upon such convict being brought before the court, they shall proceed to inquire into the facts and circumstances, and, if no legal reasons exist against the execution of such sentence, it becomes their duty to sign a warrant to the

¹ 2 R. S., 659, § 27; Laws 1835, ch. 258.

² Id., § 28.

³ Ante.

⁴ 2 R. S., 659, § 23.

sheriff of the proper county, commanding him to do execution of such sentence at such time as shall be appointed therein, which shall be obeyed by such sheriff accordingly.¹

Where the execution of the sentence of a convict is respite^d by the Governor, for the purpose of having the convict on reviewed by an appellate court, it is the duty of the sheriff to execute the sentence of the court on the day to which the execution is respited, unless the judgment be reversed, or annulled, or a further respite be granted, and it is not necessary, in such case, that the convict be previously brought into court by *habereas corpus*.²

In certain cases, where there is not a jail in the county, or the jail erected shall become unfit or unsafe for the confinement of prisoners, or be destroyed by fire or otherwise, the county judge of such county has power to designate the jail of some contiguous county for the confinement of prisoners; and the sentence of death, in such case, may be inflicted at such other jail the same as if it were located in the county where the conviction was had.³

§ 154. REPRIEVE OF CONVICTS.

By the Constitution the Governor has power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and impeachment, upon such conditions, and with such restrictions and limitations as he may think proper, subject to such regulation as may be prescribed by law relative to the manner of applying for pardons. Upon conviction for treason, he has power to suspend the execution of the sentence until the next session of the Legislature, when they may either pardon, commute the sentence, direct the execution of the sentence or grant a further reprieve.⁴

The statute further provides, that no judge, court or officer other than the Governor shall have any authority to reprieve or suspend the execution of any convict sentenced to the punishment of death, except sheriffs, in cases of insanity and pregnancy, as before mentioned;⁵ but this section of the statute does not

¹ 2 R. S., 659, § 24.

² *Peo. v. Enoch*, 13 Wend., 159.

³ 2 R. S., 659, § 29; Laws 1846, ch. 118. modified by Laws 1847, ch. 280, § 29. For the history of Capital Punishment, vide *Done v. Peo.*, 5 Park., 364.

⁴ Const. N. Y., art. 4, § 5.

⁵ Ante; 2 R. S., 658, § 15.

preclude a justice of the Supreme Court from allowing a writ of error, and making an order staying proceedings after conviction in a capital case.¹

§ 155. APPLICATION FOR PARDON.

The Executive of this State has prescribed the following regulations to be observed in making an application for a pardon:

“ Before any application for a pardon is presented to the Governor, written notice thereof must be served upon the district attorney of the county in which the conviction was had; and proof of the service of such notice presented to the Governor.

“ Notice of the application must be published for four weeks in the State paper, and also in the county paper, printed in or nearest to the town in which the conviction was had, unless (in the opinion of the Governor) justice requires that the publication be dispensed with.

“ If the conviction was had before a justice of special sessions, or a justice of the peace, notice of the application must be served upon him; and proof of such service presented with the application.

“ The minutes of the testimony taken at the trial, or a concise statement of the case as proved, to be furnished by the judge, district attorney, or justice who tried the prisoner, are required before the application is acted upon. Also, a certificate of the warden or keeper of the prison, of the conduct of the prisoner during his or her confinement in prison.”²

Whenever an application shall be made to the Governor for a pardon, he may also require the district attorney of the county in which the conviction of the person for whom the pardon is asked was had, and it is thereupon the duty of such district attorney to furnish the Governor, immediately on such requisition being made, with a concise statement of the case as proved on the trial, together with any other facts or circumstances which might have a bearing on the question of granting or refusing a pardon.³

A printed letter or circular, in accordance with the above provision, is usually sent by the Executive to the district attorney of

¹ *Carnal v. Peo.*, 1 Park, 262.

² *Laws* 1849, ch. 310; 2 R. S., 745, §§ 26, 27.

³ 2 R. S., 745, § 25; *Laws* 1849, ch. 310.

the county where the conviction was had; and in most instances a similar letter is sent to the judge who presided at the trial.

By statute, the district attorney is also required to file his minutes of evidence taken on criminal trials, in the office of the clerk of the county; and it is also made the duty of the county clerks of the several counties in this State, to transmit to the Governor, on his application, such minutes of testimony.¹

The power conferred upon the Executive by the Constitution to grant pardons, includes the power of granting a conditional pardon. Such condition may be banishment from the United States; and on a breach of the condition, the pardon becomes void, and the criminal may be remanded to his original sentence. The power to remand him may be exercised by the court in which he was convicted, or by any court of superior criminal jurisdiction.²

§ 156. OF MAKING AND FILING STATEMENTS OF CONVICTION.

Upon the adjournment of criminal courts of record, it becomes the duty of the district attorney to make and file with the clerk of the court a statement of the convictions had during the session of the court, and the clerk is then to transmit the same to the office of the Secretary of State. The provisions of the act regulating the same are given in the next succeeding sections. In a pamphlet transmitting the act to public officers and containing instructions for the same, the Secretary of State says:

"The object of the original law was to furnish evidence which would be sufficient, on an indictment for a second offence, to prove the facts of a prior conviction. Those facts, therefore, must appear in the minutes and in the transcript, or the transcript itself will be of no sort of use. A general statement that the defendant was convicted of 'grand larceny,' or of 'larceny,' or of 'arson in the second degree,' or any other similar and general description of the offence, will not prove the facts necessary to be established on the trial of an indictment for a second or subsequent offence. Such an indictment must aver that the defendant, at a particular court, held at a particular time and place, before persons to be named, was convicted of a specific offence, which must be stated with as much precision and certainty, as to

¹ Laws 1860, ch. 135, p. 216.

² Peo. v. Potter, 1 Park., 47. Vide 2 R. S., 745, § 28.

place, manner, person on whom committed, and all the legal elements to constitute crime, as in the first indictment. Of these averments must be sustained by proof; and the report furnished by the clerk of the minutes of conviction is proof of which the original law intended should be adduced. It was done to promote public justice, to save trouble to district attorneys, and to avoid the enormous expense of prolix exemplifications of records of conviction. By the act of 1867, the Legislature has more distinctly and directly declared the object, and what the statement must contain to accomplish it."

DISTRICT ATTORNEY TO FURNISH STATEMENT OF CONVICTION.

Within ten days after the adjournment of any criminal court held in this State, the district attorney of the county in which said court shall have been held, shall furnish to the clerk of said court such a description of the offence committed by the person convicted of crime, abridged from the indictment, as shall be sufficient to maintain the averments relating to such offence, and necessary to be made in an indictment for a second offence.

Every district attorney who shall neglect or refuse to furnish and deliver to the said clerk such statement within the time above specified, shall forfeit the sum of fifty dollars for each offence of neglect or refusal, to the use of the people of this State, said penalty to be recovered in a civil suit by the attorney general.¹

§ 158. DUTY OF THE CLERK THEREON.

Within twenty days after the adjournment of any criminal court of record, the clerk thereof shall transmit to the office of the Attorney General of this State such statement, thus furnished by the district attorney, of all convictions had at said court; and in case of his neglect or refusal to transmit the same as aforesaid, the said clerk shall be liable to the like penalty as prescribed in the foregoing section.²

ADDITIONAL STATEMENT IN RELATION TO INDICTMENTS TO BE MADE BY CLERK OF COURT.

Within twenty days after the adjournment of any criminal court of record, the clerk thereof shall also transmit to the office

of the Secretary of State a duly certified statement of the number of indictments tried at such court, specifying the number for each separate offence; the number on which convictions were had; the number on which defendants were acquitted; the number of indictments against persons who were convicted on confession; and also the number of indictments against persons who were discharged without trial.¹

§ 160. STATEMENT TO BE MADE BY SHERIFF IN RELATION TO CONVICTIONS.

Within twenty days after the adjournment of any criminal court of record, the sheriff of the county in which such court shall be held shall report to the Secretary of State the name, occupation, age, sex, and native country of every person convicted at such court, of any offence, the degree of instruction which each person so convicted has received, and all such other items of information in relation to such convicts and their offences as the Secretary of State shall require; which reports shall be made in such form as the said Secretary shall prescribe. And to enable such sheriffs to make the said returns, they shall be authorized, by themselves and their deputies, to make all necessary inquiries of the persons convicted, before or after trial, and of the keepers of prisons where such convicts may be confined, and of all other persons. For their services in the premises, as well as for collecting statistics relating to convictions in courts of special sessions, such sheriffs shall be allowed a reasonable compensation by the board of supervisors of their respective counties as a county charge.²

The information above required to be transmitted is usually obtained by the court from the convict at the time of his sentence.³

The act in relation to statements of convictions further declares that any sheriff, clerk or magistrate, who shall neglect or refuse to conform to the provisions above mentioned, shall forfeit the sum of twenty-five dollars for each case of neglect or refusal to the use of the people of this State.⁴

¹ Laws 1867, ch. 604, § 3, vol. 2, p. 1630.

² *Id.*, 4.

³ *Ante.*

⁴ *Id.*, § 8.

§ 161. DISTRICT ATTORNEY TO FILE MINUTES OF EVIDENCE.

It is made the duty of the district attorney, within thirty days after the close of any term of the court at which criminals are tried, to file in the county clerk's office full and correct minutes, or a copy thereof of the evidence taken on the trial of such criminals as are convicted at said term; and the county clerk is required to transmit the same to the Governor, upon his application.¹

§ 162. ORDERS OF CONTINUANCE.

The several courts of oyer and terminer and jail delivery, may by order entered in their minutes, send all indictments found at any such court for offences, triable at the court of sessions of the same county, to such court of sessions, to be proceeded on and tried therein.² And courts of sessions are required to send all indictments for offences not triable therein, to the next court of oyer and terminer and jail delivery, to be held in their respective counties, there to be determined according to law.³ Courts of sessions also have power, by an order to be entered in their minutes, to send all indictments for offences triable before them, against prisoners in jail and others, which shall not have been heard or determined, to the next court of oyer and terminer and jail delivery, to be held in their respective counties, to be there determined according to law.⁴

It is usual from day to day, during the sitting either of the courts of oyer and terminer or of sessions, as such court may be advised, to postpone the trial of any indictment pending and undetermined in such court, either to the next term of the same court, or from the court which may be in session, to the next court of sessions or oyer and terminer, as the case may happen to be, bearing the fact, however, in mind that no indictment should be sent to the next court of sessions, to be held in the county which it is not triable therein; and in ascertaining whether such indictment be triable or not in the sessions, reference must be had, of course, to the longest time of punishment which can be imposed upon a conviction for such offence. Upon the last day of the court of oyer and terminer, it is customary to enter a general

¹ Laws 1860, ch. 135, p. 216.

² 2 R. S., 205, § 16.

³ 2 R. S., 203, § 6.

⁴ 2 R. S., 203, § 7.

order, respiting and continuing to the next court of sessions to be held in the county, all indictments pending and undetermined in such court of oyer and terminer, and triable in the court of sessions, and not otherwise continued or disposed of at the same term of court, and in like manner respiting and continuing to the next court of oyer and terminer, all pending indictments not triable in the court of sessions, and not otherwise continued or disposed of at the same term. And in the courts of sessions a similar order is also generally entered upon the last day of its term, respiting and continuing to the next court of sessions all indictments triable in the court of sessions, and not previously continued or disposed of, and respiting and continuing to the next court of oyer and terminer all indictments not triable in the court of sessions, and not previously respited or continued at the same term.

It has also sometimes been the practice to enter at the close of the court, a general order continuing all recognizances given for the appearance of prisoners or witnesses, and not otherwise disposed of, to the next term of the same court, although it has been questioned whether such order is binding, and whether the recognizances should not have been estreated instead of continued by such order.

In addition to the general order of continuance for indictments, of which a precedent will be found in the appendix, the clerk of the court generally enters a special order upon each indictment continuing it to the proper court. It is well enough to see that the general order, however, is entered, in case of omission by the clerk to continue any particular indictment to its appropriate court.

CHAPTER XIII.

OF WRITS OF ERROR AND CERTIORARI, AND OF MOTIONS FOR NEW TRIALS.

IN many cases where a conviction of the defendant has been had, his counsel may be of the opinion that the proceedings had upon the trial were, in some respects, erroneous, and that the conviction is illegal, and may seek to have the proceedings reviewed by a superior tribunal.

In cases of summary convictions, as previously stated, the method of obtaining a review of the proceedings is by a common law writ of certiorari.¹

In cases of convictions had before a court of special sessions, or police court, as has been previously stated, the method of review is by the statutory certiorari in the court of sessions of the county where the conviction is had.²

In case a conviction of the defendant is had upon the trial of an indictment in a court of record, and it is sought to review the proceedings of the trial for error in a superior tribunal, recourse is had to the writs of error and certiorari provided for that purpose by the Revised Statutes.

In these cases a review is had in the Supreme Court by writ of certiorari if before judgment is pronounced, and by writ of error if judgment has been had, all appeals of felony having been abolished. Besides the reviews above mentioned, in the court of sessions, a motion may be made for a new trial upon the merits, or for irregularity, or on the ground of newly discovered evidence in all cases tried before them.

The subject of such motions, and of the review of trials had upon indictments in courts of record, will be treated of in this chapter:

The rules hereinafter laid down, in regard to the grounds of exception, contents of bills of exceptions, and the questions reviewable upon writs of error and certiorari must, however, be understood as subject to exception from the general rule in those

¹ Page 148, ante.

² Vide page 225, ante.

³ 2 R. S., 748, § 50.

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falling within the scope of the act of 1855,¹ of which men—
ill be made hereafter.³

SECTION I.

OF EXCEPTIONS AND BILLS OF EXCEPTIONS.

- Section I.—OF THE DEFENDANT'S RIGHT TO MAKE EXCEPTIONS ON THE TRIAL OF THE INDICTMENT. —
II.—EXCEPTIONS, WHEN TAKEN.
III.—GROUNDS OF EXCEPTION.
IV.—BILL OF EXCEPTIONS.
V.—TIME IN WHICH TO MAKE BILL OF EXCEPTIONS.
VI.—OF SETTLING THE BILL OF EXCEPTIONS.
VII.—RE-SETTLEMENT OF THE BILL.

§ 1. DEFENDANT'S RIGHT TO MAKE EXCEPTIONS ON THE TRIAL OF AN INDICTMENT.

On the trial of any indictment exceptions to any decision of the court may be made by the defendant, in the same cases and manner provided by law in civil cases, and a bill thereof shall be settled, signed and sealed, and shall be filed with the court, and returned upon a writ of error as now authorized in personal actions, or upon a certiorari as hereinafter provided, and the same proceedings may be had to compel the signing and sealing of such bill and the return thereof.³

To enable a party to avail himself of any irregularities in the court below it should be presented, in the first instance, in that court, either by plea in abatement or bill of exceptions, so as to introduce it upon the record, and thus subject it to review.⁴

§ 2. EXCEPTIONS, WHEN TAKEN.

When an exception is taken it may be reduced to writing the time, or entered in the judge's minutes and afterwards settled as provided in the rules of court.⁵

The law is explicit upon the point that the exceptions in which the questions of law are sought to be raised should be taken

¹ Laws 1855, ch. 337, § 3, p. 613; *Peo. v. McCann*, 2 Smith, (16 N. Y. Laws 1858, ch. 330.

² Vide post.

³ 2 R. S., 736, § 23; *Safford v. Peo.*, 1 Park, 474.

⁴ *Hayen v. Peo.*, 3 Park., 175.

⁵ Code, § 264.

time of trial. Decisions made by the judge during the trial, which are deemed erroneous, must be excepted to at the trial.¹ A point not raised at the trial cannot be taken on a motion for a new trial.²

An exception to a charge of a judge, after a jury have withdrawn, will not be received.³

Where the bill of exceptions showed that on the trial of the case a verdict was directed for the plaintiffs, with leave for the defendant to move that a non-suit be entered, and to the plaintiffs except in the same manner as if the non-suit was granted at trial, and the court, after argument at bar upon the question raised on the trial set aside the verdict, and directed a non-verdict to be entered, to which decision the plaintiffs excepted; that inasmuch as the exception was not raised at the trial, it must be disregarded.⁴

A refusal to charge as requested is not available on bill of exceptions, where such refusal was not excepted to on the trial, notwithstanding there was an exception to the charge as given.⁵

Under the old practice, if the judge at the trial of the cause, whether at bar or at *nisi prius*, either in his charge to the jury or in deciding any interlocutory question, mistake the law, the counsel on either side might tender an exception to his opinion, which required him to seal a bill of exceptions.⁶

Objections to the manner in which a jury were summoned or impaneled cannot be made for the first time after verdict.⁷

Where on the trial there is an opportunity to object, but the jury remains silent, all reasonable intendment will be made in favor of review to uphold the judgment.⁸

And where improper evidence is received, and the question of admissibility on objection is reserved, and it is taken subject to the objection, and after the evidence is closed the jury are

Went v. Bloomer, 13 N. Y. R., 341; *Johnson v. Whillock*, 3 Kern., 344; § 264.

Ford v. Monroe, 20 Wend., 210.

Life and Fire Ins. Co. v. Mech. Ins. Co., 7 Wend., 31.

Wendell Co. Mut. Ins. Co. v. Minard, 2 Com., 98; *McCracken v. Chal-* 4 Seld., 133.

Nichols v. Dusenbury, 2 Com., 283.

Bl. Com., 372.

Wright v. Enos, 1 Seld., 531.

Went v. Smith, 1 Com., 90.

instructed to disregard it, no specific objection to that course being raised at the time, such ruling cannot afterwards be complained of.¹

§ 3. GROUNDS OF EXCEPTION.

An exception is available for the purpose of correcting an error in the admission or rejection of evidence, in granting or refusing a non-suit, in charging or refusing to charge the jury on a specific proposition, or in deciding any question on the trial affecting the merits, but all that relates to the manner of conducting the trial, to the forms of the questions asked, if not objectionable in substance, and to the range allowed to counsel in their arguments, is matter of discretion as to which a remedy for a supposed error cannot be had by exception.²

Under the old practice a bill of exceptions did not draw the whole matter into examination, but only the points upon which it is taken, and the party excepting must lay his finger upon these points which might arise, either in admitting or denying evidence, or matter of law arising from a fact not denied, in which either party was overruled by the court.³

Among the reported decisions, the following may be cited as illustrating the general grounds of an exception; although most of them are to be found in the reports of civil cases, yet the general principles involved are the same as those occurring in criminal practice; but where an exception is taken so indistinctly that the court cannot readily perceive the exact point of the objection, the appellate court will disregard it.⁴

The exceptions are limited to those taken on the trial of the main issue, and are not available as to decisions made on the trial of preliminary or collateral questions, such as decisions made on a motion to quash the indictment on the grounds of irregularity in organizing the grand jury, or on an issue joined on a challenge to the array of jurors.⁵

- Where a judge omits to notice material testimony in his charge to the jury, this is not error, unless the party call his attention to it, and request him to give it in charge.⁶

¹ McKnight v. Dunlop, 1 Seld., 537.

² Peo v. Finnigan, 1 Park., 147.

³ Jackson v. Cadwell, 1 Cow., 622.

⁴ Carnal v. Peo., 1 Park., 272.

⁵ Wynehamer v. Peo., 2 Park., 377.

⁶ Ex parte Bailey, 2 Cow., 479.

Where the exception is taken to the charge of the judge, made by the jury, the exception must be specific in its nature. In a reported case, which went to the court of appeals, that court said the plaintiff's counsel excepted to the whole charge as given, and to each part of it. The charge contained several propositions, as some of which there is no doubt but what they were in accordance with the law. Some of them are, to say the least, of doubtful correctness. Upon the argument, two questions were made, one that the judge erred in his construction of a contract; the other, that the judge's instructions as to the damages, were incorrect. The exceptions did not call the attention of the judge to the points which were claimed to be erroneous. They did not suggest to his mind what the counsel excepting would have in hold, or wherein his charge was wrong. If the counsel had presented to the judge the two distinct points which he makes here, we cannot say how he would have disposed of them. It has been held in many cases that the party complaining of the charge of a judge, must put his finger on the point of which he complains. If he does not do so, no court of review can regard

The rules upon this subject, are tending rather to increased strictness, and not at all to relaxation. They have their foundation in a just regard to the fair administration of justice, which requires that when an error has supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences, and does not permit the party to lie by without making his objection, and take the chances of success on the grounds on which the judge has placed the cause; and then, if he fails to succeed, avail himself of an objection, which, if it had been stated, might have been removed. A general exception to a charge, and every part of it, when the charge involves more than a single proposition of law, and is not in all respects erroneous, presents no question for review upon appeal.¹

Where a general objection is made to the decision of a court at the trial of a cause, and on review thereof the decision, if objectionable at all, is so only in part, the party is not allowed

¹ Jones v. Osgood, 6 N. Y. Rep., 233; See Lansing v. Wiswall, 5 Denio, 213; Edwell v. Murphy, 1 Kern, 416; Sands v. Church, 2 Seld., 347; Hunt v. Lybee, 3 Seld., 266; Hart v. Rens. & Sar. R. R. Co., 4 Seld., 37; Murray Smith, 1 Duer., 412.

to avail himself of the objection for the want of precision in stating it at the trial.¹

Matters resting in the discretion of a judge, are not generally grounds of exception. Where, upon the trial of a cause, the proofs have once been closed, the refusal of the court to allow them to be opened, with a view to further testimony, cannot form the subject of exceptions, it being a matter resting entirely in discretion.² So the refusal of a court to postpone a cause, cannot be reviewed by exceptions.³ The decision of a court on a matter within its discretion, is not the subject of exceptions.⁴

If a witness who has been duly subpoenaed, either neglect to attend, or leave court after the trial has commenced, it is in the discretion of the judge whether he will suspend the trial until the witness can be brought in; and the decision of a judge upon a matter resting in his discretion, cannot be reviewed on exceptions.⁵ So, likewise, the denial of a motion to amend, where the law reposes a discretion in the judge, is not an appropriate ground of exception.⁶

An opinion expressed by a judge upon a hypothetical case put by counsel, cannot be made the ground of exception.⁷

Where it was objected that the judge, in his charge to the jury, upon the facts in the case, went beyond the line of his duty, it was held to be no ground of exception.⁸

An error committed by the admission of incompetent evidence in a court of record, against an objection by the opposite party, is cured, and an exception thereto rendered nugatory, by a subsequent direction to the jury to disregard such evidence.⁹

So, also, the admission of irrelevant testimony is not error, if it is afterwards made pertinent by other testimony.¹⁰

In order to avail a party of the omission of a judge to charge upon a question of law, or where the court omitted to charge the

¹ Reub v. McAlister, 8 Wend., 109.

² Bartholemey v. The People, 2 Hill, 248.

³ People v. Coit, 3 Hill, 432.

⁴ People v. Baker, 3 Hill, 159.

⁵ Rapelye v. Prince, 4 Hill, 119.

⁶ Roth v. Schloss, 6 Barb., 308; See Brown v. McCune, 5 Sand., 224; *Pin-*
cle v. Vaughn, 12 Barb., 215.

⁷ Walron v. Ball, 9 Barb., 271.

⁸ Bulkley v. Ketellas, 4 Sand. 450.

⁹ People v. Parish, 4 Denio, 153. ¹⁰ Black v. R. R., 45 Barb., 40.

as to the legal inference arising from the testimony in the case, it must appear by the exceptions that not only the facts upon which the question arose, but also that the court distinctly *requested to instruct the jury* as to the law on that point.¹

The general rule in relation to exceptions is, that they must be taken to a *decision* made on the trial.

Where, in deciding the competency of a witness, the judge before whom the cause was tried, *arguendo*, expressed the opinion that such witness could not have been joined as a co-plaintiff in the suit, the defendant could not, on a writ of error, be at liberty to insist upon such point as error, *it not having been presented for consideration*; the exception taken on the trial relating solely to the opinion of the judge as to the competency of a partner as a witness.²

Where evidence is erroneously received against a party, to which he excepts, and afterwards insists upon and proves the facts himself, this is deemed a waiver of the exception, and he cannot avail himself of it on a motion for a new trial.³

Where a refusal of a judge to non-suit is excepted to, a new trial will not be granted on that ground, if in a subsequent stage of the cause the facts necessary to the maintenance of the action are shown.⁴

Thus, where the evidence on which the plaintiff rests is not sufficient to entitle him to a recovery, and a non-suit is denied, a verdict will not be set aside for such cause, if subsequently in the progress of the trial, the defendant supplies the necessary proof.⁵ An exception to the charge of a judge will not lie, where there is no error in point of law in the charge, although the comments of the judge upon the evidence, strongly indicate an opinion adverse to the party against whom the verdict is rendered.⁶

It is also no objection to the charge of a judge, that in commenting upon the testimony he points out discrepancies in the testimony given by witnesses at different times, of the facts of a case.⁷

How v. Merrills, 6 Wend., 268. See *Reab v. McAllister*, 8 Wend., 112.

Ward v. Lee, 13 Wend., 41. ² *Hayden v. Palmer*, 2 Hill, 205.

Ansing v. Van Aylstye, 2 Wend., 561.

Jackson v. Leggett, 7 Wend., 377.

Jackson ex dem. Bigelow v. Timmerman, 12 Wend., 299. •

The People v. Genung, 11 Wend., 18.

An exception will not lie to the charge of a judge to a jury, on the grounds of the comments of the judge upon the evidence.¹

The exceptions ought to be on some point of law, either in admitting or rejecting evidence, or upon a challenge, or some matter of law arising upon a fact not denied, in which either party is overruled by the court.²

Exceptions are sufficiently specific where it appears that each offer or request was separately made and passed upon by the court, and each ruling excepted to.³

An exception to the decision of a judge, admitting testimony objected to, is not available unless material testimony was admitted which would be embraced in the objection.⁴

A general objection to the reading of an instrument in evidence is not available on review where the defect was in the certificate of its proof or acknowledgment, and was not pointed out.⁵

A general objection to the admissibility of evidence is sufficient, where the objection could not have been obviated on the trial had the specific grounds of objection been pointed out.⁶

As a general rule, we may say that the exception should not only be made at the time of the trial, but it should be specific in its nature, and point out, with particularity and precision, the alleged error in law complained of in regard to the rulings or decisions of the court. The policy of the law is to discourage litigations; and it is better if the counsel can see that a material error in law, prejudicial to the interests of his client, has been committed by the ruling or decision of a judge in the haste of the trial, that the court should have its attention called to it specifically and with sufficient accuracy to remedy the error at the time, and thus save perhaps the labor, expense and delay of preparing the papers and making a motion for a new trial upon a bill of exceptions. The courts, therefore, as seen from the decisions, of which a few are above cited, have refused to regard exceptions taken at the trial, which seem to them too broad and general in their nature to have allowed the trial judge to comprehend what were the actual grounds of exception intended to be taken by the counsel.

¹ *Peo. v. White*, 14 Wend., 111.

² *Kelly v. Kelly*, 3 Barb., 419.

³ *Dunckle v. Wiles*, 1 Kern., 420.

⁴ *Howland v. Willetts*, 5 Seld., 170; *Stephens v. Peo.*, 4 Park., 396.

⁵ *Mabbett v. White, &c.*, 2 Kern., 442; *Brown v. Cayuga R. R.*, 2 Kern., 486.

⁶ *Merritt v. Seaman*, 2 Seld., 168.

The courts say, in substance, that it would be equally well for the attorney to pay a little more attention to his case, and state his exceptions with precision, and obtain his relief at the trial, as it is for him to make vague and indefinite objections, which may be susceptible of two or three meanings and ambiguous, and, upon his motion for a new trial, claim that his exceptions may mean whatever may be most beneficial to his client's interest, and ask the appellate court to put that construction upon them. It is, therefore, of vital importance, where it is intended to review a trial upon a bill of exceptions, that the practitioner should be clear, plain and explicit in the exceptions raised by him during the trial, and point out with accuracy the supposed errors of law complained of.¹

Counsel, when stating an objection to a question (as he may be required to do), should state one which is well founded, otherwise his exception to the decision of the court, in overruling his objection and admitting the evidence, will not avail him; although the court may take into consideration the influence of such evidence when called upon to grant a new trial.²

Where a witness is allowed to answer a question without objection, an exception subsequently made will be disregarded.³

§ 4. BILL OF EXCEPTIONS.

A bill of exceptions lies only to bring up exceptions taken at the trial to the decisions of the court upon the evidence, or the charge given to the jury. It properly should contain no more of the facts which transpired at the trial than are necessary distinctly to raise the questions intended to be presented for review.⁴

At common law the only regular mode of redress for errors occurring on criminal trials was by motion for a new trial in the court where the trial was had, unless the error was in some matter which formed a part of the record, when it might be reviewed after judgment by writ of error. Bills of exception, by which questions of law made and decided on such trials may be brought up and reviewed in a higher court, were unknown to the common

¹ See *Ellis v. Peo.*, 21 How., 356.

² *Harris v. Panama R. R. Co.*, 5 Bos., 812.

³ *Cheeseborough v. Taylor*, 12 Abb., 227.

⁴ *Peo. v. Dalton*, 15 Wend., 581.

law, although now allowed by a statute of this State. But the statute is limited to exceptions taken on the main issue, and does not reach such as are made on the trial of a preliminary or collateral question. The words are, "on the trial of any indictment, exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil cases." A trial of the question of insanity is not a trial of the indictment, but is preliminary to such trial. The statute does not authorize exceptions to be taken on such preliminary trial, and if errors occur, they must be corrected, if at all, at common law, by the court which committed them.¹

The bill of exceptions in criminal practice is similar in its nature to the bill of exceptions under the former civil practice, or what is known under the code as exceptions. The only questions which can be raised upon the argument thereof are questions of law raised by the exceptions specifically taken at the trial to the decision of the court, either in admitting or rejecting evidence, or in relation to questions of law arising from facts not denied, in which the party was overruled by the court, and then the party excepting must lay his finger upon the points which had arisen. The bill of exceptions cannot draw the whole matter disclosed upon the trial of a cause again into discussion or examination. The question whether the verdict of the jury is against law and evidence cannot be decided on its argument. It lies only to correct an erroneous decision upon some point of law made on the trial, or some erroneous opinion delivered to the jury in the charge of the court, to which an exception was taken at the time. In preparing a bill of exceptions for review upon the law, all portions of the evidence given upon the trial, not relating to or bearing upon the questions of law sought to be raised upon the argument, should not be included in the proposed bill.²

And the rule of the Supreme Court, in relation to exceptions in civil actions, declares that they shall contain only so much of the evidence as may be necessary to present the questions of law upon which the same were taken at the trial, and it is made the

¹ *Freeman v. Peo.*, 4 Den., 21.

² *Peo. v. Haynes*, 11 Wend., 561; approved 21 Wend., 509-547; *Peo. v. Dalton*, 15 Id., 581; *Peo. v. Stockham*, 1 Park., 427; *Oldfield v. N. Y. & H. R. R.*, 4 Kern., 310.

ity of the judge, upon the settlement of the same, to strike out all the evidence and other matters which shall not have been necessarily inserted.¹

In preparing the bill and copy for service, the lines should be numbered as in civil actions, so that each copy shall correspond.²

The rule above laid down, that questions of law only are to be examined in the appellate court, must, however, be understood as subject to the provisions of the act of 1855,³ which declares that when a conviction for a capital offence, or for one punishable as minimum punishment, by imprisonment in a State prison for life, shall be brought before the Supreme Court, and Court of appeals from the court of general sessions in the city of New York, the appellate court may order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.⁴

Upon seeking a review under the above provision of the statute, where there were no exceptions taken at the trial, a case could be made as in civil actions, or if both questions of law and fact were sought to be raised, the bill of exceptions should embody the evidence, or, as it is called in civil actions, a case should be made containing exceptions.

§ 5. TIME IN WHICH TO MAKE THE BILL OF EXCEPTIONS.

The time allowed for this purpose in civil actions is within ten days after the trial.⁵ And a copy thereof is to be served on the opposite party within the same time.⁶ But in criminal actions, the bill must be signed and settled before the adjournment of the court.⁷ It is usually the practice for the court, where they are satisfied that the bill of exceptions is intended to be filed in good faith, or it is the intention of the trial judge to sign the certificate staying judgment, to delay the pronouncing of sentence

¹ Sup. Ct. Rule, 36.

² Id., 34.

³ Laws 1855, ch. 337, § 3, p. 613; amended 1858, ch. 330, p. 556.

⁴ Vide *Peo. v. McCann*, 2 Smith (16 N. Y.), 58; *Rogers v. The Peo.*, 3 Park., 12; *Done v. Peo.*, 5 Park., 364.

⁵ Sup. Ct. Rule 34.

⁶ Id.

⁷ 5 Park., 9.

until an opportunity has been afforded to make and settle the bill of exceptions.

But the Supreme Court have said, since, by the Revised Statutes, a defendant in a criminal case is allowed to make a bill of exceptions as in civil cases, and have the exceptions examined upon a writ of error; the practice of suspending judgment to enable the court below, to take the opinion of the Supreme Court, upon questions raised on the trial, ought not to be encouraged.¹

§ 6. OF SETTLING THE BILL OF EXCEPTIONS.

It has sometimes been the practice in settling bills of exceptions, to follow the rules laid down as applicable to the same subject in civil cases, by proposing amendments thereto; and noticing the same for settlement, although there is no statute requiring a copy of the bill to be served or authorizing amendments thereto. Those rules are briefly stated below. In other cases, it has sometimes been the practice to present the proposed bill of exceptions to the court for settlement, without serving a copy of the same, or waiting to have any amendments proposed thereto; but in either event, the bill should be settled and signed before the adjournment of the court, for the judges of the court of oyer and terminer have no power to settle and sign a bill of exceptions after a final adjournment of such court.² It has sometimes been the practice for the counsel to take the minutes of the trial taken by the presiding judge, and prepare a bill of exceptions upon the spot, by incorporating therein such portions of the testimony as may be material and necessary to properly present the exceptions taken; and sometimes in courts of sessions, it has been the practice for the court, as a matter of courtesy, when it has finished its other business, in case the bill and amendments thereto have not been served, to adjourn until some early day to allow the counsel for the respective sides to prepare a bill and amendments thereto for settlement; and where, after the adjournment of a court of oyer and terminer, a bill of exceptions, in a criminal case, which had been tried at such court, was settled by a justice of the Supreme Court who had presided in the trial, and was afterwards signed by such justice, and also by the two justices of the sessions who sat with him in the trial, and was filed

¹ *Peo. v. Cummings*, 3 Park., 343.

² 5 Park., 9.

more than ten days after such adjournment, and was afterwards returned as a part of the record on a writ of error to the Supreme Court, on a motion made by the district attorney, it was ordered that the bill of exceptions be stricken from the record.¹

The following is a synopsis of the practice in civil cases where amendments are proposed to the bill, and the same are settled upon notice:

Within ten days after the service of the copy of the bill of exceptions the party, upon whom the same is served, may propose amendments thereto, and serve a copy on the party serving the bill; who may then, within four days thereafter, serve the opposite party with a notice that the bill of exceptions, with the proposed amendments, will be submitted at a time and place specified in the notice to the court before which the trial was had for settlement. The court is then to correct and settle the bill of exceptions as he shall deem to consist with the truth of the facts. The time for settling the bill must be specified in the notice, and it shall not be less than four nor more than twenty days after the service of such notice.² The amendments are proposed by reference to the numbered lines of the bill. When a bill of exceptions is made, and there shall be an omission within the several times above limited of the one party to propose amendments, and of the other to notify an appearance as above stated, they shall respectively be deemed, the former to have agreed to the bill of exceptions as proposed, and the latter to have agreed to the amendments as proposed.³

The parties have the right to be heard by counsel upon the settlement, and the court will correct or amend the bill according to the facts.⁴

Whenever amendments are proposed, the party proposing the bill shall, before submitting the same for settlement, mark upon the several amendments his proposed allowance or disallowance hereof.⁵

In a case where the trial judge died after the preparation but before the settlement of the bill of exceptions, the notice of settlement was directed to be given before any justice of the court,

¹ *Birge v. Peo.*, 5 Park., 9.

² Sup. Ct. Rule 34.

³ *Id.*, 35.

⁴ *Jackson v. Tuttle*, 7 Cow., 364; 6 Cow., 569.

⁵ Sup. Ct. Rule 36.

and the moving party was directed to furnish that justice with the original minutes on the actual trial, and either side were to be at liberty to present to the judge affidavits in respect to the matters which occurred upon the trial.¹

Upon the settlement the judge may insert such facts which transpired on the trial as he conceives to render his charge intelligible, although not insisted upon by either party, and may state his charge in his own words, and may insert opinions expressed by him in the hearing of the jury though not embodied in a formal charge.² And the judge has a right to see that his charge is correctly inserted.³

He has, also, the right to strike out such parts of the evidence as are immaterial and unnecessary, to present the questions of law raised by the bill, and it is made the duty of the judge to strike out all the evidence and other matters which shall not have been necessarily inserted;⁴ so, also, he may insert such proof as goes to waive the exception, and may, in so doing, insert the defendant's proof, so that the plaintiff might insist upon it as a waiver of the exception.⁵

§ 7. RE-SETTLEMENT OF THE BILL.

In civil cases, if either party should be dissatisfied with the settlement of the bill, and the amendments as proposed thereto, it is competent for him to apply to the court upon motion for a re-settlement upon affidavits showing the errors committed on the settlement and the facts as they really were. Upon such motion, if successful, the bill of exceptions and amendments are referred back for re-settlement in regard to the alleged errors.⁶

A motion for this purpose, when otherwise admissable, may be made pending the writ from the higher tribunal. It will not be necessary first to remit the record for that purpose.⁷

A motion to correct will not be entertained upon affidavits as to a mistake of the testimony, except in a very clear case.⁸

¹ *Morse v. Evans*, 6 How., 445.

² *Walworth v. Wood*, 7 Wend., 483.

³ *Root v. King*, 6 Cow., 569.

⁴ 5 Wend., 103; Sup. Ct. Rule 36. Vide act of 1855, ante.

⁵ 7 Cow., 354; 6 Id., 449; 7 S. & Rawle, 218.

⁶ 10 Wend., 254; 5 Id., 132; 7 Id., 471.

⁷ *Witbeck v. Waive*, 8 How., 433.

⁸ *Jackson v. Miller*, 6 Cow., 38.

SECTION II.

WRIT OF CERTIORARI TO REVIEW TRIAL OF INDICTMENT.

- Section I.—GENERAL REMARKS.
 II.—BILL OF EXCEPTIONS.
 III.—STATE OF PROCEEDINGS.
 IV.—LETTING CONVICT TO BAIL.
 V.—OF THE CERTIORARI, AND RETURN OF THE CLERK.
 VI.—DISTRICT ATTORNEY TO BRING WRIT TO ARGUMENT.
 VII.—NOTICE OF THE ARGUMENT.
 VIII.—NO ASSIGNMENT OR JOINDER OF ERRORS NECESSARY.
 IX.—OF THE PROCEEDINGS IN THE SUPREME COURT.
 X.—JUDGMENT ON CERTIORARI.
 XI.—DEFENDANT NOT APPEARING AFTER JUDGMENT.

§ 1. GENERAL REMARKS.

In seeking to obtain a review of proceedings had upon the trial of an indictment, two modes are prescribed by the statute—one by certiorari, the other by writ of error. The certiorari is a proceeding after conviction and before judgment, but after judgment the proceedings can only be reviewed by writ of error.¹

In this section we shall treat only of the review by way of certiorari before judgment. The manner of obtaining the review by writ of error will be treated of in the succeeding section.

Prior to the Revised Statutes there was no bill of exceptions in a criminal case, and writ of error thereon for the review of convictions in theoyer and terminer. The review was obtained in this manner: The court suspended passing sentence, and certified the question which was in doubt to the Supreme Court, who considered and passed upon it and advised the court below either to grant a new trial or proceed to pass sentence; and sometimes, when the convict was before them, they passed the sentence themselves. Whether the trial should be reviewed was at the option of the court before which it should be had, and the party had not the right, as in civil cases, to take exceptions and carry up the record for review. In case the judge consented to the review, the necessary time for that purpose was given either by the court suspending its judgment, or after judgment pronounced by suspending the execution. The Legislature, in the Revised Statutes, altered this practice and gave to the prisoner the right to interpose his exceptions, and a right to the review of his case, and they adopted various provisions to carry out their intentions.

¹ *Peo. v. Donnelly*, 21 How., 406; *Willis v. Peo.*, 32 N. Y., 715.

They gave the party on trial an absolute right to a bill of exceptions. In certain cases the district attorney might sue out a certiorari, and so bring the exceptions to the attention of the appellate court; and, on the other hand, the defendant might sue out his writ of error, and so bring the case up for review. In all cases not capital, the writ of error was one of right, and the judge was bound to allow it. In capital cases it was in the discretion of the judge who tried the cause, or any other judge of the Supreme Court, to allow or refuse the writ. And then, to provide the time necessary for a review of the case in the higher court, it was provided in all cases that the writ of error should stay or delay the execution of the judgment, or of the sentence thereon, when there was an express direction that it should operate as a stay.¹

Since the report of the case above alluded to, the Legislature has made some amendments in relation to the practice of the writ of error, which will be noticed in the next section.

A challenge for principal cause constitutes a part of the record, and, to review this, a certiorari will lie in a criminal case; but otherwise, if a challenge to the favor.²

Error committed by a criminal court having jurisdiction of the offence and of the person of the prisoner, cannot be re-examined on habeas corpus. Whether the error occurred at the trial, or is alleged to exist in the judgment rendered, the only remedy is by certiorari or writ of error.³

§ 2. OF THE BILL OF EXCEPTIONS.

On the trial of any indictment, exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil cases, and a bill of exceptions shall be settled, signed and sealed, and shall be filed with the clerk of the court, and returned upon a writ of error, as now authorized in personal actions, or upon a certiorari as hereinafter provided; and the same proceedings may be had to compel the signing and sealing of such bill and the return thereof.⁴

In the case of the People v. Haynes (11 Wend., 561), the court,

¹ Carnell v. Peo., 1 Park., 268. See Peo. v. Gates, 15 Wend., 159.

² Ex parte Vermilyea, 6 Cow., 555.

³ Peo. v. Cavanaugh, 3 Park., 650.

⁴ 2 R. S., 736, § 23.

SON, Justice, said many questions were raised and urged upon consideration by the counsel for the prisoner, which we cannot entertain or determine, such that the verdict of the jury is against law and evidence, if the charge of the court be correct, & that the court erred in commenting upon the facts or testimony in the case. These are questions that cannot be raised on bill of exceptions, or be brought before us for review according to the established practice. By the statute (2 Revised Stat., 736, § 21), on the trial of an indictment, exceptions to any decision of the court may be made by the defendant, in the same times and manner provided by law in civil cases. In civil cases, it has long been settled that the bill of exceptions does not draw the whole matter disclosed on the trial of a cause again into discussion or examination, and that the party excepting must lay his finger on the points which may arise either in admitting or rejecting evidence, or in relation to questions of law arising from facts denied, in which either party was overruled by the court.¹ This proceeding brings up for review only questions of law, and more of the evidence should encumber the record than is sufficient to present them to the court. Everything else is surplusage, and would be stricken out on a proper application. Relief from verdicts which are against law and evidence in civil cases, must be sought by pursuing a different remedy, unless there has been no error in the ruling of the court upon a question of law. So must be in criminal cases. An exception to the rejection of proper testimony, falls with the abandonment by the district attorney of that branch of the charge to which it relates.²

In this case, there was an indictment for a nuisance, charging the defendants with causing an obstruction in a public highway, and also occasioning the atmosphere in the same locality to be infected with offensive smells by means of their business; and in the progress of the trial, the court excluded competent evidence offered by the defendants to repel the charge relating to the offensive smells, and the defendants excepted; but before the cause was submitted to the jury, the public prosecutor abandoned everything charged in the indictment except the alleged obstruction to the highway, and it was held that the defendants were not

¹ Bacon, 528, and cases cited, Phila. Ed., 1811; 5 John. R., 467, 8 Id., 1; 1 Cow., 639; 9 Wend., 296.

Peo. v. Cunningham, 1 Den., 524.

entitled to a new trial on account of the erroneous ruling of the court, as under the circumstances they could not have been injured thereby. The reader who is familiar with the grounds of exceptions taken upon trials in civil cases, will have no difficulty in ascertaining what are sufficient grounds of exception upon the trial of indictments.¹

The same exception in regard to the review of convictions for capital offences, or for those punishable as a minimum punishment in State prison for life, when had in the court of general sessions, already noticed,² must be borne in mind, where a new trial may be had, if the verdict was against the weight of evidence, or law, or justice requires it, whether any exception was taken or not in the court below.

§ 3. STAY OF PROCEEDINGS.

It is provided by statute that no such bill of exceptions shall stay or delay the rendering of judgment upon any such indictment, or the execution of such judgment, or of any sentence thereon, except as is provided by the statute.

In courts of oyer and terminer it is provided that, upon such bill of exceptions being settled and signed, if the circuit judge who tried the cause, or a justice of the Supreme Court, shall certify on such bill that, in his opinion, there is probable cause for the same, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, such certificate, upon being filed with the clerk of the court, shall stay judgment on such indictment until the decision of the Supreme Court be had upon such exceptions.

If such bill of exceptions shall have been tendered to any court of sessions, and shall have been settled, signed and sealed, and the judge who presided on the trial, or any justice of the Supreme Court, shall grant a certificate, as provided in the last section, upon the filing thereof with the clerk of the court, judgment shall be stayed upon such indictment until the decision of the Supreme Court be had upon such exceptions.

But no certificate shall be granted by a judge of the Supreme court unless application therefor shall first have been made to the judge who presided at the trial, and the reasons of such judge for refusing the same be attached to the bill of exceptions.³

¹ Vide ante.

² Ante.

³ 2 R. S., 736; §§ 25, 26, 27.

§ 4. LETTING CONVICT TO BAIL.

Upon such certificate being granted, as above provided, in any case where the offence charged is punishable by imprisonment in a State prison, or in a county jail, the court in which the trial shall have been had, or any justice of the Supreme Court, may let the defendant to bail upon a recognizance with sufficient sureties, conditioned that he shall appear in the court where such trial was had at such time as the Supreme Court shall direct, and that he will obey any order or judgment the Supreme Court shall make in the premises.¹

§ 5. OF THE CERTIORARI AND RETURN OF THE CLERK.

When judgment shall have been stayed upon any indictment, as herein provided, it shall be the duty of the district attorney of the county immediately to sue out a writ of certiorari, returnable in the Supreme Court, to remove such indictment, with the bill of exceptions and other proceedings thereon, into such court, and the clerk of the court shall without delay make a return thereto, containing a transcript of the indictment, bill of exceptions and the certificate staying judgment.²

The certiorari may be served by delivering it to the clerk of the court below during vacation, who may return it immediately, notwithstanding it be directed to the court.³

§ 6. DUTY OF DISTRICT ATTORNEY TO BRING CERTIORARI TO ARGUMENT.

The statute declares that the district attorney of the county shall bring on for argument, as soon as practicable, the return to any writ of certiorari issued by him under the provisions of the statute above cited, in cases where judgment on an indictment shall be stayed, and it shall also be competent for the defendant in any indictment removed by certiorari, as above provided, to notice and bring on for argument the return to any such writ.⁴

§ 7. NOTICE OF THE ARGUMENT.

If an attorney shall have appeared for the defendant in any indictment so removed by certiorari, by giving notice of his

¹ 2 R. S., 736, § 28.

² Id., § 29; vide 17 Abb., 345.

³ Lambert v. The Peo., 7 Cow., 103.

⁴ 2 R. S., 740, § 23.

appearance to the district attorney within ten days after filing the certificate staying proceedings, notice of argument thereon may be served on such attorney by the district attorney, as in other cases. If no attorney shall have so appeared, such notice shall be served personally on the defendant if he be in custody, and if he be not in custody it may be served by affixing the same in the office of a clerk of the Supreme Court.¹

§ 8. NO ASSIGNMENT OR JOINDER OF ERRORS NECESSARY.

No assignment or joinder in errors shall be necessary upon any certiorari, issued in pursuance of the provisions of the statute above cited, but the court shall proceed, on the return thereto, and render judgment upon the record before them.²

§ 9. OF THE PROCEEDINGS IN THE SUPREME COURT.

After the return to the writ has been made, the practice in regard to filing notes of issue, printing the writ and return, and points of the counsel, and the furnishing of copies thereof to the court, and the argument of the same at the general term held in the judicial district where the conviction is had, is of the same character as the practice, in those respects, in civil causes.

§ 10. JUDGMENT ON CERTIORARI.

By the provisions of the Revised Statutes, if upon the return to any certiorari removing an indictment upon which judgment shall have been stayed, the Supreme Court shall decide against the exceptions taken, it shall either proceed to render judgment and pronounce sentence against the defendant, or shall remit the proceedings to the court in which the trial shall have been had, with directions to proceed and enter judgment.³

But by a subsequent act of the Legislature, the Supreme Court shall, upon affirming or reversing the judgment or other proceedings, remit the record to the court, from which the same was removed, and the court to which the same shall be so remitted shall have power to proceed thereon according to the decision and direction of the Supreme Court.⁴

¹ 2 R. S., 740, § 24.

² Id., § 25; see *Hayen v. The Peo.*, 3 Park. Cr. R., 175.

³ Id., § 27.

⁴ Laws 1859, Ch. 462, § 2, p. 1074; Vide Laws 1862, ch. 226.

Under the old statute, in the case of the *People v. Haynes*, (11 Wend., 557,) which was a case where a writ of certiorari had been sued out under the provisions of the statute above referred to, the court, in concluding their opinion in the case, said, upon the whole, after a careful examination and consideration of the bill of exceptions in this case, and all the questions raised upon it, we are compelled to come to the conclusion that no rule of law has been violated against the prisoner, and that he has been lawfully convicted; and we therefore direct that the indictment, bill of exceptions, and all proceedings, be remitted to the court below, to the end that judgment be rendered against him.

§ 11. DEFENDANT NOT APPEARING AFTER JUDGMENT.

If the defendant in any indictment shall be let to bail after the giving of any judgment as above provided, and shall neglect to appear at any new trial that may have been ordered, or to appear and receive judgment, the court authorized to render such judgment, or in which such new trial shall have been directed, may cause such defendant to be arrested, in the same manner as upon the finding of an indictment, and may forfeit his recognizance and direct the same to be prosecuted.¹

SECTION III.

WRIT OF ERROR TO REVIEW TRIAL OF INDICTMENT.

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| Section | I.—GENERAL REMARKS. |
| | II.—WHEN WRIT TO ISSUE. |
| | III.—WRITS OF ERROR ON BEHALF OF THE PEOPLE IN CRIMINAL CASES. |
| | IV.—BILL OF EXCEPTIONS. |
| | V.—STAY OF PROCEEDINGS. |
| | VI.—WRIT TO BE FILED. |
| | VII.—CUSTODY OF DEFENDANT. |
| | VIII.—OF LETTING THE DEFENDANT TO BAIL. |
| | IX.—RETURN TO THE WRIT. |
| | X.—DUTY OF DISTRICT ATTORNEY. |
| | XI.—NOTICE OF ARGUMENT, AND SERVICE THEREOF. |
| | XII.—COURT, HOW TO PROCEED. |
| | XIII.—JUDGMENT. |
| | XIV.—NEW TRIAL. |
| | XV.—DEFENDANT NOT APPEARING. |

§ 1. GENERAL REMARKS.

BLACKSTONE defines a writ of error to be, in practice, an original writ, which lies after judgment in an action at law in a court

¹ Vol. 3, R. S., 5th ed., 1035, § 29.

of record to correct some supposed mistake in the proceedings or judgment of the court.¹

LORD COKE says it is a writ which lieth where a man is greived by any error in the foundation, proceeding, judgment or execution.²

A writ of error has further been defined to be an original writ issuing out of the court in which it may by law be made returnable, in the nature as well of a certiorari to remove a record from an inferior to a superior court, as of a commission to the judges of such superior court to examine the record and to affirm and reverse the judgment according to law.³

A writ of error is used to remove the indictment and other proceedings from the oyer and terminer or sessions into the Supreme Court, after judgment given in the court below, for the purpose of reversing such judgment. When once judgment is given, this is the only remedy for any defect in the proceedings, but it can never be obtained before judgment.⁴

The mode of reviewing a decision of the oyer and terminer, as it existed previous to the adoption of the Revised Statutes, compared with the present practice, will be found in *Carnell v. The People*, in 1 Park. Cr. R., 262.

The present provisions of the Revised Statutes upon this subject are to be found in article second, title six, chapter two of part four of the Revised Statutes.

A justice of the Supreme Court has power to allow a writ of error, and to make an order staying proceedings after conviction in a capital case.⁵

The proceedings upon certioraris and writs of error in many respects are similar, the essential difference being that one is sued out by the district attorney, in behalf of the people, while the other is generally sued out by the defendant. One seeks a review of the case before judgment; the other after judgment has been rendered. Both are based upon a bill of exceptions. The general characteristics are the same. The special differences will be observed by a careful perusal of the last and present sections.

¹ 3 Bl. Com., 406.

² Co. Litt., 288.

³ 2 Saund., 100, n. 1; 2 Bac. Abr., 448.

⁴ 1 Chit. Cr. L., 747; *State v. Ruthven*, 19 Mis., 382; *Kinsley v. The State*, 3 Ohio (N. S.), 372; 4 Yeates, 319.

⁵ *Carnal v. The People*, 1 Park. Cr. R., 262.

§ 2. WHEN WRIT TO ISSUE.

Formerly writs of error upon judgments rendered on any indictment for a capital offence, could not issue unless allowed by one of the justices of the Supreme Court, upon notice given to the Attorney General or to the district attorney of the county where the conviction was had, and no officer other than such as are above enumerated was empowered to allow such writ.¹

But it is now provided that they shall issue upon convictions for capital offences, or for one punishable as a minimum punishment, by imprisonment in a State prison for life, to the court of general sessions in the city of New York, as a matter of right.²

It is provided by statute that in all other cases than those above mentioned, writs of error upon any final judgment rendered upon any indictment are writs of right, and issue, of course, in vacation as well as in term, out of the court in which by law they may be made returnable.³

In cases not capital, a writ of error for the purpose of reviewing a final judgment of the court of oyer and terminer is a writ of right, and issues, of course, and brings before the Supreme Court the bill of exceptions with the transcript of the record.⁴

It is no objection to a writ of error that the prisoner's fine has been paid, or that his sentence of imprisonment has been fully executed.⁵

An order quashing a conviction and sentence is not a judgment upon an indictment which can be reviewed in a writ of error,⁶ for it is only a judgment that is authorized to be reviewed.⁷

Thus, an order of the court of sessions that judgment against the defendant be arrested, cannot be reviewed; nor an order quashing an indictment, and discharging a defendant from custody,⁸ although a judgment arising on demurrer may be,⁹ even

¹ 2 R. S., 740, § 16; 1 Park., 611.

² Laws 1855, ch. 337, § 3; amended Laws 1858, ch. 330; Vide *Walter v. Peo.*, 32 N. Y., 147; 31 How., 140

³ 2 R. S., 740, § 17.

⁴ *Safford v. The People*, 1 Park., 474. See *Yates v. The People*, 6 John., 335; *Lavett v. The People*, 7 Cow., 339.

⁵ *Bartholemey v. The People*, 2 Hill, 248.

⁶ *Peo. v. Barry*, 10 Abb., 225; 4 Park., 657.

⁷ *Peo. v. Tarbox*, 30 How., 318; *Peo. v. Loomis*, Id., 323.

⁸ Id.

⁹ *Peo. v. Hartung*, 23 How., 814.

where the plea of not guilty remained in the record undisposed of.¹

A writ of error lies immediately to the Court of Appeals from a judgment of the Supreme Court reversing a final decree or judgment of an inferior court, notwithstanding the judgment sought to be reviewed directs a new trial or like proceedings in the inferior court. The Court of Appeals say there is no reason for any distinction in this respect between civil and criminal cases.²

§ 3. WRITS OF ERROR IN BEHALF OF THE PEOPLE IN CRIMINAL CASES.

Writs of error to review any judgment rendered in favor of any defendant, upon any indictment for any criminal offence, except where such defendant shall have been acquitted by a jury, may be brought in behalf of the people of this State, by the district attorney of the county where such judgment shall be rendered, upon the same being allowed by a justice of the Supreme Court, and the Court of Appeals shall have full power to review by writ of error on behalf of the people, any such judgment rendered in the Supreme Court, in favor of any defendant charged with a criminal offence.³

It was held, prior to the passage of this act, that a writ of error would not lie in behalf of the people, after judgment for the defendant, in a capital case.⁴

The act of 1852, enabling the people to bring error in certain cases, applies only to final judgments, and a judgment leaving an issue of fact undisposed of, is not final. The indictment contained several counts, and the prisoner pleaded not guilty to the first, and demurred to the others. The defendant had judgment on the demurrers, and the people, without trying the issue of fact, or otherwise disposing of it, brought error in the Supreme Court, which affirmed the judgment. The Court of Appeals reversed the judgment of the Supreme Court, and directed that court to dismiss the writ of error to the oyer and terminer.⁵

In the above cited case in 4 Kern., WRIGHT, J., said, that in the *People v. Corning* (2 Com., 9), it was held, that the people

¹ *Hartung v. Peo.*, 26 N. Y., 154. ² *Id.*, 26 N. Y., 154.

³ 2 R. S., 742, § 31; *Laws* 1852, ch. 82.

⁴ *People v. Corning*, 2 Com., 9. See *People v. Carnell*, 2 Seld., 463.

⁵ *People v. Merrill*, 4 Kern., 74; reversing 2 Park., 590.

could not bring error after judgment for the defendant in a criminal case. This decision led in 1852, to the passage of an enabling act. This act authorized the district attorney of the county where the judgment was rendered, upon the same being allowed by a justice of the Supreme Court, to bring a writ of error in behalf of the people of the State, to review any judgment rendered in favor of any defendant, upon any indictment for any criminal offence, except where such defendant shall be acquitted by a jury. The judgment mentioned, and which this statute authorizes a writ of error on behalf of the people to review, is clearly a final judgment upon the whole record. It is a judgment rendered upon an indictment, and not upon particular counts thereof, leaving others undisposed of.¹

So, also, the people are not entitled to a writ of error to review the order of the Supreme Court granting a new trial in a criminal case, where there had been a conviction, and certiorari with stay of judgment in the court below. The writ only lies where there has been judgment for the prisoner upon the indictment.²

The act applies to judgments as well upon verdict, as to those on demurrers,³ and it is no objection that the record was drawn up without any request from the prisoner.⁴

§ 4. BILL OF EXCEPTIONS.

As has been before noticed, on the trial of any indictment, exceptions to any decision of the court may be made by the defendant, in the same cases and manner provided by law in civil cases, and a bill of exceptions shall be settled, signed and sealed, and shall be filed with the clerk of the court, and returned upon a writ of error, as now authorized in personal actions, or upon a certiorari, as provided by statute; and the same proceedings may be had to compel the signing and sealing of such bill and the return thereof.⁵

In seeking to review a trial had in a criminal case, it is of vital importance that the proper exceptions should be duly taken as

¹ Vide 2 Seld., 463.

² *Peo. v. Nestle*, 19 N. Y. (5 Smith), 583.

³ *Peo. v. Clark*, 7 N. Y. (3 Seld.), 385.

⁴ 19 N. Y., 549.

⁵ 2 R. S., 736, § 23.

in civil cases, and the principal questions of law sought to be reviewed, are raised by bill of exceptions, as upon exceptions in a civil action.¹

A verdict will not be set aside upon a bill of exceptions, although there was error upon the trial, if the error was such that it could work no injury to the exceptant. This rule was applied to a case of conviction for murder, where there was an error in the charge respecting the law of homicide; but the facts of the case did not call for a charge upon the point.²

The act of 1855, previously referred to, makes a distinction as to the contents of the bill of exceptions, where the conviction was for a capital offence, or one punishable as a minimum punishment by imprisonment in a State prison for life, in cases of convictions in the court of general sessions.³

§ 5. STAY OF PROCEEDINGS.

But no such writ of error shall stay or delay the execution of such judgment or of sentence thereon, unless the same shall be allowed by a justice of the Supreme Court, with an express direction therein that the same is to operate as a stay of proceedings on the judgment, upon which such writ shall be brought.⁴

A stay of proceedings on a conviction in a criminal case, till a decision on writ of error, is a matter of discretion.⁵

There is an exception to the above provision of the statute, which declares that where the conviction is for a capital offence, or for one punishable as a minimum punishment by imprisonment in a State prison for life, the same may be brought before the Supreme Court and court of appeals, from the court of general sessions, in and for the city of New York, by a writ of error, with a stay of proceedings as a matter of right.⁶

A judge of the Supreme Court has power to allow a writ of error, with a direction therein staying execution.⁷ The provision that no judge, court or officer other than the Governor, shall have authority to reprove or suspend the execution of any convict sen-

¹ Ante.

² *Shorter v. The Peo.*, 2 Com., 193, affirming 4 Barb., 460.

³ Laws 1855, ch. 337, § 3, p. 613. Vide ante; Laws 1858, ch. 330.

⁴ 2 R. S., 740, § 18.

⁵ *Peo. v. Holmes*, 3 Park. Cr., 567; 5 Abb., 420.

⁶ Laws 1855, ch. 337, § 3. See also Laws 1858, ch. 330.

⁷ 2 R. S., 740, § 14, 16.

tenced to the punishment of death,¹ does not relate to a stay of execution for the purpose of a judicial review.²

§ 6. WRIT TO BE FILED.

Such writ, when so allowed, shall be filed with the clerk of the court in which the judgment was rendered, who shall furnish to the party filing the same, a certificate of the filing thereof, with a copy of the allowance.³

§ 7. CUSTODY OF DEFENDANT.

If the defendant, in the indictment for the removal of which such writ of error shall be allowed, be in the custody of the sheriff of the county, and such allowance direct a stay of proceedings on the judgment, it shall be the duty of such sheriff, upon being served with the clerk's certificate of such writ, to keep such defendant in his custody without executing the sentence which may have been passed upon such indictment, and to detain such defendant to abide such judgment as may be rendered upon such writ of error.⁴

§ 8. OF LETTING THE DEFENDANT TO BAIL.

If the offence charged in the indictment for the removal of which such writ of error shall be allowed, be punishable in a State prison or in a county jail, any officer authorized by the statute above cited, to allow such writ of error, may allow a writ of habeas corpus, to bring before him the defendant in such indictment, and may, thereupon, let him to bail upon a recognizance with sufficient sureties, conditioned that the defendant shall appear in the Supreme Court to receive judgment on such writ of error, or in the court in which the trial on such indictment shall have been had, at such time and place as the Supreme Court shall direct, and that he will obey every order and judgment which the Supreme Court shall make in the premises.⁵

In all cases, where a writ of error has been properly allowed under the provisions of the statute above cited in criminal cases,

¹ 2 R. S., 658, § 15.

² *Carnal v. The Peo.*, 1 Park., 262.

³ 2 R. S., 740, § 19.

⁴ *Id.*, § 20.

⁵ *Id.*, § 21.

an application by the prisoner to be admitted to bail may be made under the section last quoted, although the writ of error is returnable in the Court of Appeals. Upon an application by a prisoner to be let to bail, under this section of the statute, the officer is to use a discretion; he is to act judicially and not ministerially, and, in the exercise of the power conferred upon him, he is to be governed by such legal considerations as have hitherto properly controlled courts and officers in the discharge of their duties in similar cases. Bail in criminal cases is not based on the grace or the favor of the court, but solely on the doubt which may exist as to the prisoner's guilt. If his guilt is past dispute he ought not to be bailed. At each step of the proceedings the grounds upon which a prisoner can be let to bail, diminish as the evidences of his guilt increase. After conviction and sentence his claims to be let to bail are further diminished; yet even at that point, if it appears that his conviction was unjust, or there is serious doubt of his guilt, his application may be granted.

It seems that the statute gives to a prisoner under conviction and sentence the right to apply to be let to bail, even after his conviction has been adjudged, to be legal by the Supreme Court. But at that stage of the proceedings the legal doubts concerning the guilt of the prisoner, ought to be considered so well settled against him that the application for bail, if made to a judge at chambers, should be very cautiously entertained, and only granted in cases of great question and difficulty.¹

§ 9. RETURN TO THE WRIT.

Upon any writ of error being filed, which shall operate as a stay of proceedings, it shall be the duty of the clerk of the court to make a return thereto without delay, containing a transcript of the indictment, bill of exceptions and judgment of the court, certified by the clerk thereof.²

Where the return to a writ of error contained no judgment on record, but only the indictment and the clerk's minutes of the trial, it was held that there was nothing before the court on which the error could be assigned.³

¹ The *Peo. v. Restell*, 2 Barb., 450.

² 2 R. S., 740, § 22.

³ *Thompson v. Peo.*, 3 Park., 208.

The provisions of the statute prescribing the contents of the return to be made by the clerk, to writs of error in criminal cases, and declaring that the court shall proceed on that return and render judgment upon the record before them, do not limit the general powers of the court to redress all errors, and for that purpose to bring before it such proceedings in the cause not fully presented in the record made up in the court below as may be important to enable it do so.¹

The regularity of all the proceedings should appear by the record itself, and upon writ of error, if any material defect appear on inspection of the record, the judgment should be reversed.²

The return to a writ of error brings before the court the indictment, all pleas thereto, whether general or special, the proceedings thereon, and the bill of exceptions, and all those matters are open to review.³

The proceedings of a court of sessions, in the trial of an indictment, will not be reviewed on writ of error by the Supreme Court until a record of judgment shall have been made up and filed, and where the return to a writ of error was defective in this respect, on motion of the district attorney, the writ of error was quashed.⁴

Since the adoption of the Revised Statutes a party, who has brought a writ of error to reverse a judgment in a criminal case, cannot allege diminution and sue out a writ of certiorari, but the cause must be decided upon the return to the writ of error; which return properly includes the pleadings, the bill of exceptions, if any, and the judgment. Any irregularity, which cannot be made to appear in the return to the writ of error, can be made available, on motion in the court below, either to quash the indictment, or for new trial, or for other appropriate relief, according to the circumstances of the case; thus, if an irregularity has been allowed in summoning or empanneling the petit jury, unless the defendant can present the objection in the form of an exception to some decision upon the trial, he cannot make it the ground of reversing the judgment upon a writ of error.⁵

¹ *Peo. v. Cancemi*, 16 N. Y. (2 Smith) 501; 7 Abb., 271; see *O'Leary v. Peo.*, 17 How., 316.

² *McGuire v. Peo.*, 2 Park., 148; vide *Thompson v. Peo.*, 3 Park., 208.

³ *Grant v. Peo.*, 4 Park., 527.

⁴ *Dawson v. Peo.*, 5 Park., 118; see *Weed v. Peo.*, 31 N. Y., 465.

⁵ *McCann v. Peo.*, 3 Park., 272.

The proceedings of a court of sessions will not be reviewed on writ of error until a record of judgment shall have been made up and filed, and when a return to a writ of error was defective in this respect, on motion of the district attorney the writ of error was quashed.¹

§ 10. DUTY OF THE DISTRICT ATTORNEY.

The district attorney of the county shall bring on for argument as soon as practicable the return to such writ of error, and it shall also be competent for the defendant, in any indictment removed by writ of error, to notice and bring on for argument the return to any such writ.²

A motion to set aside a stay of proceedings and quash a writ of error, may be made by the district attorney, and the prisoner's counsel cannot avail himself of the objection that such motion should have been made by the Attorney General.³

§ 11. NOTICE OF ARGUMENT AND SERVICE THEREOF.

If an attorney shall have appeared for the defendant in any indictment so removed by writ of error, by giving notice to the district attorney, within ten days after the filing of such writ of error, notice of argument thereof may be served on such attorney by the district attorney, as in other cases. If no attorney shall have so appeared, such notice shall be served personally on the defendant, if he be in custody, and if he be not in custody, it may be served by affixing the same in the office of a clerk of the Supreme Court.⁴

By the designation, "office of a clerk of the Supreme Court," is undoubtedly meant the office of the clerk of the county where the trial and conviction was had.

§ 12. COURT, HOW TO PROCEED.

It is provided by statute that no assignment of errors or joinder in error shall be necessary upon any writ of error issued pursuant to the provisions of the statute above cited, but the court shall proceed on the return thereto, and render judgment upon the record before them.⁵

¹ Dawson v. Peo., 5 Park., 118.

² 2 R. S., 741, § 23.

³ Carnell v. The People, 1 Park. Cr., 262.

⁴ 2 R. S., 741, § 24.

⁵ 2 R. S., 741, § 25.

The Revised Statutes have obviated an assignment of error and allegations of diminution on writs of error and certiorari in criminal cases. In deciding a criminal case, therefore, brought up on a writ of error, the Supreme Court cannot look beyond the record of judgment.

To enable a party to avail himself of any irregularities in the court below, it should be presented, in the first instance, in that court, either by plea in abatement or bill of exceptions, so as to introduce it upon the record, and thus subject it to review upon a writ of error after judgment.¹

The finding of the jury at the oyer and terminer, upon a mere question of fact, cannot be reviewed by the appellate court on a writ of error, although it appear affirmatively that the bill of exceptions contains all the testimony given on the trial.²

But this is otherwise where the conviction was for a capital offense, or one punishable by a minimum imprisonment in State prison for life, and was had in the court of sessions of the city and county of New York.³

The practice in the Supreme Court in relation to notes of issue, printing and furnishing copies of the appellate papers and points, is the same as upon writs of certiorari and appeals in civil actions, which are heard at the general term of the Supreme Court.

§ 13. JUDGMENT.

The provisions of the Revised Statutes were as follows: If the Supreme Court shall affirm such judgment, it shall direct the sentence pronounced to be executed accordingly. If the Supreme Court shall reverse the judgment rendered, it shall either direct a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case.⁴

But by amendment of 1859,⁵ it is now provided that whenever, after conviction upon any indictment, the record thereof shall be removed from any other court into the Supreme Court for the purposes of review, the Supreme Court shall, upon affirming or reversing the judgment or other proceedings, remit the record

¹ *Hayes v. The People*, 3 Park. Cr., 175.

² *Colt v. The People*, 1 Park., 611.

³ Laws 1855, ch. 337, § 3; Laws 1858, ch. 330.

⁴ 2 R. S., 714, § 26.

⁵ Laws 1859, ch. 462, § 2, p. 1074; Vide Laws 1862, ch. 462.

to the court from which the same was removed, and the court to which the same shall be so remitted shall have power to proceed thereon, according to the decision and direction of the Supreme Court. And, by a further amendment,¹ it is provided that the appellate court shall have power, upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the said appellate court shall direct.

Where a court of review reverses a judgment for error in the record, it must generally render such a judgment as the court below ought to have rendered.²

But if a wrong judgment be given against a defendant, which is reversed on error, the court of review can neither give a new judgment, nor send the proceedings back to the court below for a proper judgment, unless the case be presented by bill of exceptions when a *venire de novo* may be awarded.³

Where the defendant demurred for a misdemeanor in the court below, and judgment was there given against the people, which was reversed on error, held that the court above must render a final judgment for the people on the demurrer, and pass sentence on the defendant, and that he could not be permitted to withdraw the demurrer, and plead.⁴ A judgment against the defendant in a criminal case, will not be reversed by default.⁵

It was not the intention of the Legislature, in authorizing bills of exceptions to be filed in criminal cases, that convictions should be reversed for any and every error committed on the trial. The important and controlling question in such cases is, whether any error has been committed which could affect the rights of the accused. If there has been any such error, however slight it may have been, the conviction should be set aside. But all exceptions not having a direct reference to the merits of the case, should be disregarded.⁶

The district attorney can move to quash a writ of error and stay of proceedings in a capital case.⁷

¹ Laws 1862, ch. 462, p. 406.

² *Peo. v. Taylor*, 3 Denio, 91.

³ *Idem*, also 17 How., 316.

⁴ *Idem*.

⁵ *Peo. v. Lohman*, 2 Barb., 216.

⁶ *Carnal v. Peo.*, 1 Park., 262.

⁷ *Barron v. The Peo.*, 1 Barb., 136.

It was held that on error, a new trial cannot be granted on the ground of newly discovered evidence. Thus in the *People v. McMahon* (2 Park., 672), the court said "relief is also asked on the ground of newly discovered evidence, and affidavits are laid before us with a view of showing that important evidence has been discovered since the trial. No such ground is available on a writ of error. We can only review the legal questions growing out of the trial, and reverse for any error that may be found to have been there committed. For any mistake of fact, or for any relief upon the ground of new evidence, the party can only look to the tribunal in which the issue was tried. The power of theoyer and terminer to grant a new trial on the merits, has been ably, and, I think conclusively vindicated by one of my associates, in the *People v. Morrison* (1 Park. Cr. R., 625): at all events, no such power is vested in the appellate tribunal;" but

has since been held that a court ofoyer and terminer has no power to grant a new trial upon the merits, and that a motion for a new trial upon the grounds of irregularity, may be made upon affidavits, on the hearing of the return to a writ of error.¹

In *Barron v. The People*, (1 Barb., 136), the court said they could not reverse a judgment by default in a criminal case; that a convicted criminal could not be got out of the State prison by default, but that they must be satisfied there was error in the record or proceedings in the court below.

In the cases mentioned in the act of 1855,² the court may order a new trial, if it be satisfied that the verdict against the prisoner was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

Under the act of 1855, above cited, the court is not required to reverse for every error which would be the subject of exception, but only when the court is satisfied that the verdict is against the weight of evidence, or against law, or where justice requires a reversal.³

The rule that a verdict will not be set aside on a bill of exceptions, although there was error on the trial, if the error was such

¹ 6 Smith, 531; 5 Park., 621. See page 462, post.

² Vide ante.

³ *Peo. v. McCann*, 15 How., 805.

that it could work no injury, is the same in criminal as in civil cases.¹

Generally, the question in a court of review is, whether the judgment of the subordinate tribunal was erroneous when pronounced upon the law as it then stood; but on a writ of error, the court of appeals will reverse the judgment, although the court below did not err in pronouncing it, if from a subsequent change in the law it is evident that the judgment ought not to stand or be executed.²

The default of the defendant does not entitle the district attorney to a reversal of the proceedings in the court of sessions as a matter of course. It is the duty of the court to determine the case upon the writ and return, in the same manner as if the defendant had appeared and argued the case.³

Erroneous instructions by the judge will not authorize the reversal of the judgment where it appears from the form of the finding, as matter of legal necessity, that the error did not affect the result, and wrought no actual prejudice to the party.⁴

§ 14. NEW TRIAL.

If a new trial be ordered by the Supreme Court, as provided by the section of the statute above cited, the same shall be in the court in which the indictment was first tried.⁵

On error in a criminal case, whether there is a bill of exceptions or not, where the judgment, if reversed, must be reversed upon the record alone, and upon the ground that a wrong judgment was given upon a lawful and regular verdict; the court should not order a new trial if the prisoner could plead his former regular trial and conviction in bar of another trial.⁶

But the Supreme Court may, since the act of 1863, remit a cause brought up on writ of error from the oyer and terminer, in which that court has passed a sentence not warranted by law, with directions to pronounce the proper sentence.⁷

¹ *Shorter v. Peo.* 2 N. Y., 193.

² *Hartung v. Peo.*, 22 N. Y., 95.

³ *Peo. v. Tarbox*, 30 How., 318.

⁴ *Peo. v. Bransby*, 32 N. Y., 525. Vide 28 How., 205.

⁵ 2 R. S., 741, § 28.

⁶ *Sheppard v. Peo.*, 24 How., 388.

⁷ *Peo. v. Ratzky*, 29 N. Y., 124.

§ 15. DEFENDANT NOT APPEARING.

If a defendant in any indictment shall have been let to bail after the bringing of any writ of error, as provided by the statutes above cited, and shall neglect to appear at any new trial that may have been ordered, or to appear and receive judgment, the court authorized to render such judgment, or in which such new trial shall have been directed, may cause such defendant to be arrested in the same manner as upon the finding of an indictment, and may forfeit his recognizance, and direct the same to be prosecuted.¹

SECTION IV.

OF MOTIONS FOR NEW TRIALS.

Section I.—NEW TRIALS UPON THE MERITS, OR FOR IRREGULARITY, OR ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

II.—GROUNDS OF THE MOTION.

- a. NEWLY DISCOVERED EVIDENCE.
- b. ON THE GROUND OF SURPRISE.
- c. IRREGULARITY IN SUMMONING AND DRAWING THE JURORS.
- d. BIAS OR HOSTILITY OF THE JURORS.
- e. TAMPERING WITH THE JURY.
- f. MISCONDUCT OF THE JURY.
- g. VERDICT AGAINST EVIDENCE.
- A. VERDICT AGAINST LAW.

§ 1. NEW TRIALS UPON THE MERITS, OR FOR IRREGULARITY, OR ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

A new trial may be defined to be the re-investigation of the facts in a case, or rather of the legal rights of the parties upon disputed facts. In other words, it is a re-hearing, of the cause granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose before another jury.²

The subject of a new trial, in criminal cases, is of paramount importance to the ends of justice as well as to the accused personally. If the defendant has been improperly convicted, he should neither suffer the punishment nor the disgrace which attaches to his conviction. The law should supply the means of correcting the error, and if it fail to do so it is remiss in its highest duty—that of full protection to the rights of the citizen.³

¹ 2 R. S., 742, § 29.

² 2 G. & W. on New Trials, 32.

³ 1 Arch. Cr. Pr., 178, note.

The English rule, that in no case of felony can a new trial be granted, has no foundation in reason, and has never been established as authority in our courts. There is no reason why a man who has been defeated by surprise, by failure in proof, or for any of the numerous causes for which new trials are granted in circuit suits, should be permitted another opportunity to establish the right, which does not exist and cannot be applied with more force for allowing an innocent man, who has been wrongfully convicted, the right to assert and prove his innocence by another trial.¹

Courts of sessions, by statute, have the power in the several counties of this State, to grant new trials upon the merits, or for irregularity, or on the ground of newly discovered evidence, in all cases tried before them.²

But the court of oyer and terminer has no power to order a new trial upon the merits, after a conviction for felony.³

Where the conviction is in the oyer and terminer, and it is desired to make a motion for a new trial, on the ground of an irregularity, which does not appear upon the record, the proper course is to remove the proceedings into the Supreme Court, either by writ of error after judgment, or by certiorari before judgment; and after the writ has been returned, and not before, affidavits may be read upon the argument to correct an error arising out of an irregularity prejudicial to the rights of the prisoner, which does not appear upon the record, and where he has no other legal mode of redress, such as improper conduct on the part of one of the jurors.⁴

The application, when made to a court of sessions, to set aside a conviction for irregularity, surprise, or upon the ground of newly discovered evidence, must be made before judgment. The statute does not give power to set aside a judgment regularly entered.⁵

As to whether the provisions of the act of 1860, granting leave to make motions for new trials in criminal cases, extends to the

¹ *Peo. v. Stone*, 5 Wend., 42; *Peo. v. Judges*, 2 Barb., 282.

² *Laws 1859*, ch. 339, § 4, p. 794.

³ *Appo v. The Peo.*, 20 N. Y. (6 Smith), 531.

⁴ *Willis v. Peo.*, 5 Park., 621.

⁵ *Peo. v. Donnelly*, 21 How. Pr., 406.

court of general sessions of the city of New York, there are conflicting decisions.¹

But the Court of Appeals have held that the court of general sessions, and the court of sessions of any county, are one and the same tribunal.²

The superior court of Buffalo, has power to grant a new trial to a defendant convicted of a misdemeanor, either on the judge's minutes, at the same term at which he was convicted, or on a case at general term.³

In considering an application for a new trial upon the merits, or for irregularity, or on the ground of newly discovered evidence, the motion is usually made in the ordinary manner of other motions upon affidavits, accompanied with a notice of motion upon the usual notice. The first of the above mentioned grounds, in relation to a new trial upon the grounds of irregularity, though it may not be made upon a case or exceptions, is in general made upon the judge's minutes at the time of the trial, in an analagous manner to similar motions in civil actions, as regulated by the code of procedure,⁴ rather than upon a notice of motion and motion papers.

The other grounds of surprise and newly discovered evidence, however, as they relate more particularly to matters resting without the knowledge of the trial judge, could not be made upon his minutes, and are properly brought before the court upon a regular notice of motion, accompanied by affidavits and papers establishing the facts upon which the new trial is sought to be had, and in cases where the motion is made upon the ground of newly discovered evidence, it has been the practice to have a case duly made and settled, in order that the court may see in what respect the newly discovered evidence is material.

The statute, conferring the power to make the motion, is silent as regards the details of the practice. Under the civil practice, where a motion was made for a new trial upon the ground of newly discovered evidence, and nothing but the affidavits in support of the motion were handed up, the court refused to hear the motion, because the affidavits were not accompanied by a case

¹ *Peo. v. Powell*, 14 Abb., 91; *Peo. v. Sessions*, 15 Abb., 59.

² *Lowenberg v. Peo.*, 27 N. Y., 336.

³ *Peo. v. O'Brien*, 4 Park., 203.

⁴ Code, § 264.

showing what transpired on the trial; observing that was the settled practice of the court, and that it could not be departed from.¹ And it has been held, in the Superior Court of the city of Buffalo, that the motion must be either upon the judge's minutes or a case made and settled.²

It is too late to raise the objection that the case is not made after commencing the argument.³

The facts required to be established by the affidavits, will more fully appear by reference to the reported decisions, stating the instances in which such an application can be sustained. It may be well to remark, that the strongest case must be made out, as the courts are reluctant to grant relief upon such applications, unless absolutely necessary for the purpose of a due administration of justice. An order granting a new trial upon the ground of newly discovered evidence, and surprise does not involve the merits of the action. The new trial is granted to ascertain what the merits are.⁴

§ 2. GROUNDS OF THE MOTION.

Among the grounds of a new trial, may be enumerated any flagrant misbehavior of the party prevailing, toward the jury, which may have influenced their verdict, or any gross misbehavior of the jury themselves, the fact that the verdict is contrary to evidence, or without evidence, or if the judge himself has misdirected the jury, so that they have found an unjustifiable verdict, or where the defendant has been surprised, or where there is newly discovered evidence, for these, and for other reasons of the like kind, it is the practice of the courts to award a new or second trial; but if two juries agree on the same, or a similar verdict, a third trial is seldom awarded, for the law will not readily presume that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.⁵

(a) *Newly Discovered Evidence.*—In regard to granting new trials on the ground of newly discovered evidence, the following principles are said to be settled :

¹ Anon 7 Wend., 331, 4 How., 265.

² *Peo. v. O'Brien*, 4 Park., 203.

³ *Seeley v. Chittenden*, 4 How., 265.

⁴ 10 Barb., 303.

⁵ 3 Blac. Com., 387.

1. The testimony must have been discovered since the former trial.
2. It must be such as could not have been obtained with reasonable diligence on the former trial.
3. It must be material to the issue.
4. It must go to the merits of the case, and not to impeach the character of a former witness.
5. It must not be cumulative.¹

Evidence is cumulative when it goes to the fact principally controverted on the former trial, and respecting which the party asking for a new trial, produced testimony on the trial of the cause.²

It cannot be objected to the granting of a new trial, on the ground of newly discovered evidence, that such evidence is cumulative, if the evidence alleged to be newly discovered, is of a different kind and character from that adduced on the trial; as where the evidence on the trial is wholly circumstantial, and the evidence newly discovered is positive and direct.³

It is well observed in the cases referred to, that it is the duty of parties to come to the trial prepared upon the principal point, and that new trials would be endless, if every additional circumstance bearing on the fact in controversy, or the discovery of an additional witness was a cause for a new trial. Such a practice would not only occasion great delay, but would offer strong temptations to the subornation and commission of perjury. Cases sometimes arise in which it is difficult to determine whether the newly discovered evidence is strictly cumulative or not; but where it is clearly of that character, consisting of additional witnesses to the same facts testified to on the former trial, or of additional facts and circumstances tending to establish the principal point established before, it has universally been held, not only in this State, but in England, that it is no ground for granting a new trial. An exception to the rule has been made in this State, in

¹ *Peo. v. Superior Ct.*, 10 Wend., 285; *Porter v. Talcott*, 1 Cow., 359; 4 Cow., 622; 30 Barb., 655; 2 Hilt., 285; 2 Cai., 132-163; 3 Id., 186; *Peo. v. Lack*, 2 Park., 673; 18 John., 489; 8 Id., 86; 15 Id., 212.

² 10 Wend., 285; *Brisbane v. Adams*, 1 Sandf., 195; *Fleming v. Hollenback*, Barb., 271; *Guyot v. Butts*, 4 Wend., 579; 15 Wend., 270; 1 E. D. Smith, 107; 12 John., 354.

³ *Guyot v. Butts*, 4 Wend., 579.

relation to trials investigating the title to lands in our military tract, founded upon considerations peculiar to that class of cases.¹ But with that exception, the rule is believed to be universal.²

It ought to appear that the testimony has been discovered since the last trial, or that no laches is imputable to the party, and that the testimony is material. If the party had knowledge of the existence of the testimony, but could not procure it in time, he ought to have applied to postpone the former trial.³

The party applying for a new trial, on the ground of newly discovered evidence, must lay before the court the facts newly discovered, or show some good reason for the omission.⁴

And it is competent for the adverse party to show, by affidavit, that the witness whose testimony is stated to be material, and newly discovered, is wholly unworthy of credit.⁵

The party moving should produce the affidavit of the witness of the fact, or proof that it cannot be obtained.⁶

And on the motion counter affidavits may be read, without having been served on the party moving.⁷

Newly discovered evidence, which goes merely to impeach the credit of a witness examined on the trial, is not ground for granting a new trial.⁸

NOTE.—For cases bearing upon this subject, vide 10 Wend., 285; 1 Cow., 359; 18 John., 489; 2 Cai., 67-155; 15 John., 293; 2 Park., 673; 10 How., 261; 8 Abb., 310; 7 Barb., 271; 3 John. Cases, 596; 6 How., 293; 3 Cai., 307; 3 John., 170; 4 Wend., 579; 4 John, 425; 2 Hall, 391; 1 Sandf., 195; 3 Duer., 366; 8 John., 84; 15 Id., 210; 1 Cai., 24; 8 Abb., 310; 2 Hilt., 285-290; 30 Barb., 655; 24 How., 58.

¹ 14 John., 186; 5 Cow., 207.

² *The People v. The Superior Court of the State of New York*, 5 Wend., 120. Vide 1 Caine, 24; 3 John., 255; 5 John., 248; 14 John., 186; 4 Mass., 399; 5 Mass., 261-353; 8 John. 65; 15 John., 210; 9 Cow., 266.

³ *Vanderwort v. Smith*, 2 Cai. 155; 3 Id., 307-313; *Jackson v. Malin*, 15 John., 293.

⁴ *Hollingsworth v. Napier*, 3 Cai., 182.

⁵ *Williams v. Baldwin*, 18 John., 489; *Fleming v. Hallenbeck*, 7 Barb., 271; 2 Cai., 260; Col. & C. Cases, 408.

⁶ *Denn v. Merrill*, 1 Hall, 382. Vide 4 John., 425.

⁷ *Strong v. Platter*, 5 Cow., 21.

⁸ *Brown v. Hoyt*, 3 John., 255; *Shumway v. Fowler*, 4 Id., 425; *Harrington v. Bigelow*, 2 Den., 109; *Meakim v. Anderson*, 11 Barb., 215; *Beach v. Tooker*, 10 How., 297.

(b) *On the Ground of Surprise.*—Where the party alleges surprise as a ground of his application for relief, he should show that some act prejudicial to him has been done, which, with a proper inquiry into the case, he could not have anticipated, and against which he could not, with due vigilance, have protected himself.¹

In moving for a new trial on the ground of surprise, by the testimony of his own witness, the party must produce the affidavits of other persons, showing that he can make out a different case by them.²

The motion, when made upon the grounds of irregularity, cannot be entertained by reviewing erroneous decisions of the judge. They can only be corrected by exceptions.³

Many of the grounds of surprise which occur upon the trial of civil actions, such as misapprehension of the notice of trial, want of notice of trial, the cause being tried out of its order upon the calendar, the absence of the party, and the like, do not occur upon criminal trials. It is not a good ground for a new trial, that there was a difference of opinion between the party and his counsel as to the best mode of defence.⁴

A new trial will not be granted even in a criminal case, because the district attorney, by mistake, withholds in his hands testimony important to the defendant, unless the latter uses due diligence to obtain it.⁵

The court, in its discretion, may grant a new trial on the ground of surprise; and perturbation of counsel, arising from sudden and dangerous sickness occurring in his family, and coming to his knowledge during the trial, where such perturbation deterred the counsel from making an important claim on behalf of his client, which he had a right to make.⁶

As a general rule, it cannot be alleged as a ground of surprise, that testimony has been unexpectedly ruled out on the trial.⁷

Where testimony is offered at the trial, which could not have

¹ *Craig v. Fanning*, 6 How., 336.

² *Phenix v. Baldwin*, 14 Wend., 62.

³ *Craig v. Fanning*, 6 How., 336.

⁴ *Cone v. Beresch*, Thach. Cr. Cases, 684.

⁵ *Peo. v. Vermilyea*, 7 Cow., 368.

⁶ 3 G. & W. on New Trials, 930.

⁷ *Id.*, 945, *et seq.* Where see Exceptions to the Rule.

been anticipated, and consequently, no provision has been made to explain or rebut it, and the result is thereby disastrous, a new trial will be granted.¹

Where it is discovered, after verdict, that a material witness had been convicted of felony, and was, therefore, incompetent, a new trial cannot be demanded as a matter of right.²

But the court will, however, in such cases, in its discretion, grant a new trial whenever it seems advisable in the furtherance of justice.³

Where a material witness was subpoenaed by defendant, and attended, but shortly before the cause was called on, absented himself, and his absence was not discovered by defendant until after the jury were sworn, by which means a verdict passed against the defendant, it was held that a new trial should be granted.⁴

A new trial will not be granted on the ground of surprise, which surprise arose from the production of an unexpected witness to certain facts, to impeach whom no preparation had been made, and the omission to call an anticipated witness whose impeachment had been prepared for.⁵

In an action for seduction, the female having sworn that she became pregnant by the defendant on a particular day, affidavits showing an *alibi* and surprise, were held good ground for a new trial.⁶ The new trial will not be granted where the party becomes surprised after the rendering of the verdict.⁷

It is very questionable whether surprise, founded on a mistake in law, can be made a ground for a new trial. It cannot, when it arose solely from the negligence of the moving party; thus, where the defendant had been convicted of keeping a disorderly house, and on motion for a new trial, it appeared from his affidavits that the conviction was had solely upon evidence that his tenant of the basement kept that part of the house in a disorderly manner; that he, the defendant, occupied the floor above, and supposed that he was only required to defend, as he did, the character of

¹ 3 G. & W. on New Trials, 952, *et seq.*

² Com. v. Green, 17 Mass., 515.

³ 3 G. & W. on New Trials, p. 988, 990.

⁴ Ruggles v. Hall, 14 John., 112.

⁵ Beach v. Tooker, 10 How., 297.

⁶ Sargent v. ———, 5 Cow., 106.

⁷ Peo. v. Mack, 2 Park., 673.

art occupied by himself; and the affidavits did not show he had, but left the inference that he had not disclosed all facts to his counsel, and did not show that he had discovered material evidence not before known to him, and within his it was held that he was not entitled to a new trial.¹

Irregularity in summoning and drawing jurors. — Great less was formerly required in the names of the jurors, both christian and surname, and a variance in this respect has been fatal, and a new trial ordered. But in this State such errors are cured by verdict, and may be supplied and amended by the court.²

Where the officer summoning the jury is interested in the case, it is in general good ground of challenge to the array, and if the challenge was overruled, sufficient cause for a new trial.

Where, by the course of practice in returning the jurors, the officer is put entirely out of the power of the officer to select an improper juror, it has been held that his interest is not a ground of challenge.³

Mistakes or omissions of officers in empanneling jurors, where the mistakes and omissions have no tendency to affect the verdict adversely to the accused, will not be a ground for a new trial.⁴ When the irregularity deprives the party complaining of a substantial right, it will be fatal.⁵

Where a juror has been challenged and set aside, if he afterwards sits upon the jury as a talesman, the party at the time ignorant of the fact, it is sufficient ground for a new trial.⁶ Where the sheriff is the only person to whom is committed the power of selecting and returning jurors, any interference by him is illegal, and vitiates the return.⁷

It is also, an improper interference by the court, as if the court arbitrarily discharge a juror after he is sworn without any sufficient reason for so doing.⁸

¹ *v. O'Brien*, 4 Park., 203.

² 2 R. S., 425.

Ira. & Wat., 180, *et seq.*

³ *Id.*, 185.

⁴ *v. Vermilyea*, 7 Cow., 382; *Peo. v. Griffin*, 2 Barb., 427; 12 Pick., Sumner, 19; 4 Barn. & Ald., 430; *Peo. v. Ransom*, 7 Wend., 417; 4 N. H., 5 Mass., 435; 4 Iredell, 96; 5 *Id.*, 58; 2 Mason, 91.

Ira. & Wat., 159, *et seq.*

⁶ 2 *Gra. & Wat.*, 191, 192.

Ira. & Wat., 173, *et seq.*

Mason, 91; 8 *Humph.*, 597.

It must appear affirmatively on the record that the jury were sworn, or it will be an error. The oath must not only be administered, but it must be in the form prescribed by law.¹

The statute, as to the mode in which jurors are to be drawn, is directory, and a neglect to conform to its provisions is not in itself a sufficient ground for setting aside a verdict where the prisoner has not been prejudiced.²

(d) *Bias, or Hostility of Jurors.*—This may consist of prejudice amounting to ill will; thus, where the foreman of the jury, on the morning of the day of trial, declared that he had come from home to hang every damned counterfeiting rascal, and that he was determined to hang the prisoner at all events, or words to that effect, this was held to be ground for a new trial;³ and where a juror, before the trial, declared that, if the testimony did not hang the prisoner, there was no use of laws, it was held that he was totally disqualified to act as a juror.⁴

A settled preconceived opinion will disqualify a juror, although the bias do not involve a degree of prejudice which amounts to malice or ill will.⁵ And where the juror's mind is pre-occupied with an opinion upon the issues to be tried, which it would require evidence to remove, it incapacitates him as a juror.⁶

The fact that a person has made himself conversant with what are related in a newspaper as the facts of the case, does not necessarily disqualify him to sit in that case as a juror.⁷

In testing the qualification of jurors, a distinction has sometimes been drawn between an opinion formed and expressed from mere rumor and from a reliable source, but such a distinction is unfounded and opposed to the subject of authority.⁸

The fact that a juror has formed an unfavorable opinion of the character of the accused, will not of itself disqualify the juror.⁹

¹ 1 Arch. Cr. Pr., 178, note.

² *Peo. v. Ferris*, 1 Abb. P. (N. S.), 193; 7 Cow., 164; 7 Wend., 427.

³ *State v. Hopkins*, 1 Bay., 327.

⁴ 19 Ohio, 198.

⁵ 10 Humph., 456; 11 Id., 232.

⁶ *Cancemi v. Peo.*, 2 Smith (16 N. Y.), 501.

⁷ *Peo. v. Honeyman*, 3 Den., 121; *Peo. v. Lohman*, 2 Barb., 216; Id., 1 Com., 379; *State v. Porter*, 18 Conn., 186. Vide Gra. & Wat., vol. 2, 444, *et seq.*

⁸ *Peo. v. Mather*, 4 Wend., 229.

⁹ *Com. v. Buzzell*, 16 Pick., 153.

The question has arisen, whether the party must, in order not to waive the bias of jurors, challenge them. The prevailing rule seems to be that, although an omission to challenge a juror before trial is, in general, a waiver of the objection to him, yet, if the party at the time did not know that there was ground for challenge, a new trial may be granted.¹ But he must prove that he was ignorant of the disqualification at the trial, otherwise knowledge and waiver will be presumed.²

(e) *Tampering with the Jury*.—The courts universally deprecate everything that looks like improper interference with the just and upright discharge of the duties of jurors, and where such interference comes from the accused before the trial, a new jury will be empaneled.³

The interference with the jury by a stranger is not looked upon as inherently fatal, but is rather judged of by the influence which it may have had upon the final result. It may be stated as a general rule that where such interference is unattended with corruption, or the jury has not been prompted by a party, and it does not appear that any injustice has thereby been done, the verdict will not be disturbed.⁴

Where, after a conviction of perjury, it appeared that certain papers calculated to make an unfavorable impression upon the jury were exhibited and read by the prosecution at several public places, during the week of the trial and just before it, in the presence of several persons, and that some of the jurors boarded at those places, a new trial was granted.⁵

The tampering with the jury by the officer having them in charge would of course be ground for a new trial.⁶ The jury should not examine witnesses after they have been sworn and retired;⁷ nor should a juror influence his fellows by private infor-

¹ Gra. & Wat. on New Trials, vol. 2, pp. 470, 471.

² Id., 474, *et seq.*; 13 Sme. & Marsh, 286; 2 Blakf., 114; 6 Mo., 426.

³ 1 Arch. Cr. Pr., 178, note.

⁴ Id.; 6 Leigh, 615, 7 Watts & Serg., 415; 11 Hump., 169; 8 Id., 602; Graham & Waterman on New Trials, vol. 2, 309, *et seq.*

⁵ State v. Hascall, 6 N. H., 352.

⁶ Nelms v. State, 13 Sm. & Mar., 500; 2 Swan, 378.

⁷ Gra. & Wat., vol. 2, p. 342, *et seq.*

mation possessed by him;¹ nor should the jury entertain written evidence that was not introduced in the trial.²

(*f*) *Misconduct of the Jury*.—The law appears to be well settled that if a jury take refreshments, before they are agreed, at the charge of the party for whom they find a verdict, it shall be set aside; but it must be shown that the refreshments were at the charge of the prosecution, or a verdict against the prisoner will not be disturbed on this ground.³

The rule has been laid down, that however improper the conduct of a juror may have been, yet if it does not appear that it was occasioned by the prevailing party, or any one in his behalf, if it do not indicate any improper bias upon the juror's mind, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside.⁴

The drinking of spirituous liquors by jurors, even in small quantities, was formerly deemed ground for a new trial, without inquiry as to whether there had been any abuse in the particular instance.⁵ But it was afterwards held, that misconduct of this kind, on the part of the jury, ought not in itself to overturn the verdict unless there be some reason to suspect that the irregularity may have had an influence on the final result.⁶

The affidavits of the jurors themselves cannot be received to explain the grounds of their verdict, or to show that they intended something different from what they found, or to impeach their verdict, or to show impropriety or misconduct upon their part.⁷

But, it is said, they may, to show mistake made by them in making up their verdict, where the mistake arises from circum-

¹ 6 Humph., 275; 4 Yerg., 111; 1 Swan, 61.

² 16 Ark., 568; 10 Rich., 212.

³ Peo. v. Olcott, 2 John. Cases, 301; 3 Murphy, 487; 12 Pick., 496.

⁴ Stephens v. Peo., 4 Park., 396; 8 Abb., 132; 1 Cow., 221; 7 Id., 478; Graham & Waterman on New Trials, vol. 2, pp. 593, 594; Hardenburgh v. Cray, 15 How., 307; 2 Cow., 589; 5 Id., 283; 1 Hill, 207; 15 How., 307.

⁵ Peo. v. Douglass, 4 Cow., 26; Brant v. Fowler, 7 Cow. 562.

⁶ Wilson v. Abrahams, 1 Hill, 207. But see Brant v. Fowler, 7 Cow., 562.

⁷ Jackson v. Dickenson, 15 John., 309; Taylor v. Everett, 2 How. Pr., 23; 9 Id., 7; 4 Park. Cr. R., 396-619; 12 How., 428; 4 John., 487; 3 Cai., 56; 5 Den., 367.

stances passing at the trial, which are equivalent to a misdirection of the judge.¹

But, although the affidavits of the jurors cannot be received to impeach the verdict for impropriety on the part of any of the jury, they may be for the purpose of showing the improper conduct of the successful party in approaching them on the subject pending the trial;² and, also, to prove improper conduct of the officer having the jury in charge.³

The affidavits of jurors that the constable, at the request of a juror, handed to that juror a paper, showing the punishments for the different degrees of crime, are not admissible to impeach the verdict; they go to show an act on the part of their own body, and are, therefore, within the rule excluding jurors' affidavits.⁴

Although the affidavits of the jurors cannot be received to impeach their verdict, yet, on a motion to set aside a verdict for misbehavior of the jury, the affidavits of the jurors are admissible to sustain the verdict and disprove the charges.⁵

(g) *Verdict Against Evidence.*—It is difficult to lay down any precise rule by which courts, in all cases, are to be governed in applications for new trials, for verdicts against evidence. The discretion of the court ought to be exercised, so as to subserve the great end of all trials, a fair and impartial administration of justice. Each case must, in a measure, stand on its own proper ground. While on the one hand, courts ought not to interfere arbitrarily, or in doubtful cases, with the appropriate province of the jury, on questions which the Constitution and the laws have placed peculiarly under their jurisdiction; they should, on the other, exercise the power which the same authority has conferred on them, when the substantial ends of justice require it.⁶

It is the legal duty of courts to see that the issues of fact in their courts are fully and fairly tried, and if the verdict, or the finding of facts is so clearly, without or against evidence, as to

¹ *Exp. Caykendall*, 6 Cow., 53.

² *Reynolds v. Champlain Tr. Co.*, 9 How., 7.

³ *Peo. v. Carnel*, 1 Park., 256; *Francis' Case*, 1 City H. Rec., 121. Vide 8 Abb., 137.

⁴ *Peo. v. Wilson*, 8 Abb., 137.

⁵ *Dana v. Tucker*, 4 John., 487; *Nesmith v. Clinton Ins. Co.*, 8 Abb., 141; *Eastwood v. Parker*, 3 Park., 25; *Peo. v. Probst*, 5 Park., 52.

⁶ *Fox v. Clifton*, 6 Bing., 754.

satisfy the court that injustice has been done, the court will set aside the verdict for the purpose of a new trial before another jury.¹

The presumption is in favor of the verdict, and where the evidence, though slight is uncontradicted, the verdict will stand; but a new trial will be granted where the verdict is without evidence, or manifestly against the weight of evidence.² But where there is a conflict of evidence, courts will reluctantly interfere to set aside a verdict, and grant a new trial, even though they deem the conclusion reached by the jury erroneous.³

It is the right of the jury to weigh the evidence, and to be the exclusive judges of its effect; and it is their sole duty, as it is their privilege, to derive from it their verdict. So, also, the credibility of testimony is a matter within their sole cognizance, and great latitude is necessarily allowed jurors in drawing inferences from testimony. They are the proper judges of its bearing and effect, and the presumptions arising from it.⁴

And to set aside a verdict, where there was evidence on both sides, there must be such a preponderance of evidence as to satisfy the court either that there was an absolute mistake on the part of the jury, or that they acted under the influence of prejudice, passion or corruption.⁵

In criminal cases, if the evidence is conflicting, and the question is one of doubt, and no error was committed by the court in its charge, a new trial will, in general, be denied.⁶

(h) *Verdict Against Law*.—The jury are to receive, as binding, the law laid down by the court, and after a conviction, if the verdict is against the law, it will be set aside. Indeed, it is a universal rule, that where the verdict is clearly against the law, a new trial will be granted.⁷

¹ *Adsit v. Wilson*, 7 How., 64.

² *State v. Lyon*, 12 Conn., 487.

³ 3 G. & W. on New Trials, p. 1240, *et seq.*; 6 Cow., 682; 7 Barb., 271; 7 How., 64; 27 Barb., 828; 5 Sandf., 180.

⁴ 3 G. & W. on New Trials, p. 1261-1275, *et seq.*

⁵ *Cohen v. Dupont*, 1 Sandf., 260. Vide 3 E. D. Smith, 98; 5 Barb., 337; 7 How., 251; 33 Barb., 127-347; 36 Id., 23; 29 Id., 218-491-504; 24 How., 58; 29 Barb., 226; 9 Abb., 45; 10 Bos., 108; 29 How., 155.

⁶ *Peo. v. Goodrich*, 3 Park., 518.

⁷ 3 G. & W. on New Trials, p. 1180, *et seq.*

In the preceding pages, the author has endeavored to trace, step by step, the various proceedings taken in a criminal action from its commencement, by taking the initiatory step of making a complaint against the accused, down to the carrying out of the sentence of death.

It will have been observed, that the rights of the citizen are most carefully guarded in criminal prosecutions; he may demand an examination, and if the proof is insufficient, may be discharged upon his preliminary arrest;—a grand jury interposes, twelve of whom, at the least, must concur in finding the indictment. If the indictment be manifestly bad in law, it may be quashed; he is entitled to a copy of the indictment; to a public trial, to be confronted with the witnesses against him; to produce his own witnesses by process extended by the court, and to be defended by counsel. The petit jury must be unanimous, and if they entertain a reasonable doubt of the guilt of the accused, he must be acquitted; and after conviction, for sufficient errors in the proceedings, he is entitled to have the judgment arrested. He may also take exceptions upon the trial, and have his case reviewed by a superior tribunal, and upon the grounds of irregularity, surprise, newly discovered evidence, and other grounds, move the court for a new trial, which will be granted in case sufficient reasons therefor exist.

The experience of the law has demonstrated, that it is as necessary that the citizen should be shielded from oppressive or malicious criminal prosecutions as it is that the property and life of the citizen should be guarded by the administration of the same law, in convicting offenders and punishing them for its violation. As has been observed, "it highly concerns the safety of every individual, as well as the general morality and happiness of the people, that the innocent be protected against unmerited severities, and that the guilty be conducted with certainty to punishments proportionate to their crimes."¹

A perusal of the foregoing pages, as compared with the earlier history of the criminal law in the parent country, will show the progress which has been achieved by a more humane and enlightened consideration of the rights of an accused party. For the purpose of distinctly observing the important changes made by

¹ Principles of Penal Law. London, 1771.

the advancing strides of civilization and progress, it is not necessary to refer as far back as the ordeals by fire or by water, nor to the sanguinary trial by battle, when the defendant, if innocent, was often murdered, or, if guilty, escaped with the additional crime of having slain his adversary; but it will be amply sufficient to review the conduct of the trial by jury. In the former history of a criminal trial by jury, every stage of the proceeding was conducted in an unknown language, and so continued, written in a strange hand, with technical abbreviations, as to matters of record, indictments, pleas, verdicts, judgments, etc., until the time of George the Second;¹ and at the common law, in capital cases, no prisoner was entitled to a copy of the indictment, or any of the proceedings. Upon the trial of Lord Preston, 1690, a copy was urged, and he desired to have it argued by counsel, but the court unanimously refused; "it being a point that would not bear debate." It was also refused to Colonel Sidney and Sir Harry Vane. In the early administration of the criminal law, the ancient *justiciarii in itinere* made their circuit round the kingdom, for the purpose of trying causes and criminals, only once in seven years; in which interval, by the common calculation of lives, it is probable that, exclusive of the distresses and consequent depopulation of families, one half of the wretches under suspicion and in custody died in dungeons.² Even as late as the reign of Charles the Second, it was a common practice for the judges, upon their circuits, to impose arbitrary fines upon grand juries, for supposed concealments and non-presentments; which was a most dangerous exertion of power, tending to the encouragement of ill-founded accusations.³ And, as an additional severity, the use of counsel was permitted only on the part of the prosecution; because, to use the language of Sir E. COKE,⁴ "the testimony and proof of the crime ought to be so clear and manifest that there can be no defence of it;" a humane reason, which however existed, so far as the sufficiency and clearness of testimony was concerned, in speculation only; for the first and most essential principles of evidence seemed to be either unknown or wholly disregarded.

¹ 12 Geo. II., ch. 26.

² Prin. of Penal Law, 178.

³ Id.; Vaughn's Rep., 153; 2 Hale's P. C., 160.

⁴ 3 Inst., 29.

BOOK II.

OF INDICTABLE OFFENCES.

CHAPTER I.—OF FELONIES.

II.—OF MISDEMEANORS.

III.—OF THE INDICTMENT.

IV.—OF CRIMINAL EVIDENCE.

OF INDICTABLE OFFENCES.

BLACKSTONE says that a crime or misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprises both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word "crimes," is made to denote such offences as are of a deeper and more atrocious dye, while smaller faults, and omissions of less consequence, are comprised under the gentler names of "misdemeanors" only.¹

The knowledge of this branch of jurisprudence, which teaches the nature, extent and degrees of every crime, and adjusts to it its adequate, and necessary penalty is of the utmost importance to every individual in the State; for (as a very great master of the crown law has observed, upon a similar occasion),² no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct should tempt a man to conclude, that he may not, at some time or other, be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the

¹ Black. Com., Bk. IV, § 5.

² Sir Michael Foster.

has successively erected as barriers between the crown officers and the humblest citizen. The law, in its just interference between the despotism of crowned heads and the struggles of a people who wrenched from a monarch's grasp a *Magna Charta*, a bill of rights, and *habeas corpus*, has been compelled to observe many forms for the protection of liberty which, to those who have not made the criminal law a study, may appear absurd; but it is better that a criminal may now and then escape a deserved punishment, by an adherence to these rules, than that a reverence for these rules should be departed from, and the criminal law administered with such oppressiveness that the people should be in danger of losing those liberties which cost them so many struggles to obtain.

By the Constitution of this State, such parts of the common law of England, as were in force in the colony of New York on the 19th day of April, 1775, were retained in the old Constitution of 1777, and the same were by the new Constitution, except where they had been repealed or altered, or were repugnant to the Constitution, continued as the law of this State, subject to such alterations as the Legislature should make concerning the same. The colonists have been considered as bringing with them only such parts of the law of the mother country as were applicable to their own situation, and the particular laws and customs of special districts of England, were, therefore, never adopted by them.¹

Offences which may be made the subject of indictment, were by the common law divided into treasons, felonies, and misdemeanors, but by our law they are classified into felonies and misdemeanors. These two subdivisions will be taken up and discussed separately in the two following chapters.

¹ 1 Black. Com., 107.

CHAPTER I.

OF FELONIES.

By the common law, a felony, in the general acceptation of the criminal law, comprised every species of crime, which occasioned at the common law the forfeiture of either lands and goods, or both, and to which capital or other punishment may be added according to the degree of guilt.¹

By the Revised Statutes of this State, however, it is enacted that the term "felony," when used in any statute, shall be construed to mean an offence, for which the offender, on conviction, shall be liable by law to be punished with death, or by imprisonment in a State prison.²

And the term "felonious" when used in any statute shall be construed as synonymous with the word "criminal," and the term 'feloniously,' when so used as synonymous in meaning with the word "criminally."³

If it be required to determine whether an offence is to be designated as a felony, or not, we have but to apply the above statutory definition, and ascertain whether it be punishable with death or by imprisonment in a State prison.

In the *People v. Steenburgh*, the prisoner's counsel contended that the offence (appearing in disguise armed, etc.), was not a felony, because its commission was not necessarily to be punished by imprisonment in the State prison, but might be punished by fine and imprisonment in a county jail. But the court held that the offence was felony, because it was liable by law to be punished by imprisonment in a State prison; and it was none the less felony, because it was also liable to be punished by some milder punishment, the statute definition of felony in this State being 'an offence for which the offender, on conviction, shall be liable by law to be punished by death, or imprisonment in the State prison.'⁴

¹ 4 Black. Com., 94, 95.

² 2 R. S., 702, § 40.

³ *Idem*, § 41.

⁴ 1 Park., 45.

In the *People v. Borges*, BARNARD, Recorder, commenting upon the above statute, says it follows that where a statute creating an offence, provides as a punishment therefor, imprisonment in a State's prison, although, in the discretion of the magistrate, lesser punishment may be inflicted, then that offence becomes a felony, unless its grade of crime is specifically declared in the statute. Thus, if in a statute a crime is declared to be a misdemeanor, that would be its grade, although the punishment should be imprisonment in a State prison; but this declaration must be clear and explicit in the statute, and not drawn by way of argument from general expressions used. Now, the statute in question does prescribe as a punishment such imprisonment in the State prison, and does not declare in specific and express terms the grade of crime to which the offence shall belong.¹

Judge W. F. ALLEN, in *Klock v. The People*, says the intent of the statute was to do away with the common law definition of felony as entirely inapplicable, and to substitute one which should have significance and be readily understood, and that the clear intent and proper meaning of the statute is to declare all crimes (not expressly denominated misdemeanors by statutes creating them), which are punishable by imprisonment in the State prison, to be felonies. This has been the judicial interpretation of the provision, and the decisions accord with the intent of the framers, and the general understanding of the profession.²

Therefore, in cases where the measure of the punishment to be inflicted rests in the discretion of the court, and the tribunal pronouncing sentence may punish in the alternative, either by imprisonment in the State prison, or by fine, or by imprisonment in the county jail, the offence may be classified within the statutory definition of a felony equally with offences where the punishment is absolute with death or imprisonment in the State prison, and where no discretion is vested in the tribunal inflicting the punishment, allowing a lesser punishment to be inflicted, unless the statute, defining the offence, shall declare in specific and direct terms that the grade of offence shall be classified as a misdemeanor.³

Felonies are of two kinds, viz: at common law and by statute.

¹ 6 Abb. Pr. R., 132.

² 2 Park., 685.

³ Id.

The character of those offences which were felonies at common law, are not necessarily changed by the fact that the punishment imposed by our statute is less than imprisonment in a State's prison, if there is no enactment reducing it below the grade of felony.

Thus, in the *Peo. v. Adler* (2 Park. Cr. R., 254), it was said: "By the common law the crime of petit larceny is a felony. (1 Hale P. C., 530; 1 Hawk., P. C., 146.) It was supposed by the court below that the Revised Statutes have reduced the offence to a misdemeanor. There are only two questions of the statutes which have a bearing on the question. By 2 Revised Statutes (p. 690, § 1) it is declared: "That every person who shall be convicted of stealing, taking, and carrying away the personal property of another of the value of twenty-five dollars, or under, shall be adjudged guilty of petit larceny." Section thirty (p. 702) provides that "the term felony, when used in this act or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a State prison." It will be observed, that the definition of the latter section applies only when the word is used in a statute, and that the former section does not use the word, and is silent as to the grade of petit larceny. The common law rule, that petit larceny is a felony, therefore appears to be untouched, and to remain in force in respect to all questions controlled solely by the common law.¹

But petit larceny is not to be deemed a felony under the provision of 2 R. S., 701, § 23, declaring that no conviction for an offence other than felony shall disqualify a witness. Thus, in *Carpenter v. Nixon*, 5 Hill, 260, NELSON, Ch. J., says, it is provided by statute (2 R. S., 586, § 23, 2d ed.), that "no person sentenced upon a conviction for a felony shall be competent to testify, etc., unless he be pardoned by the Governor or by the Legislature, except in the cases specially provided by law, but *no sentence upon a conviction for any offence other than a felony shall disqualify or render any person incompetent to be sworn, or to testify, etc.* At common law petit larceny was a felony, and the offender an incompetent witness after conviction and sentence. In the case of *Ward v. The People* (3 Hill, 395),

¹ Vide *Ward v. The Peo.*, 3 Hill, 395; *Carpenter v. Nixon*, 5 Id., 260; *Ward v. The Peo.*, 6 Id., 144.

- False tokens and pretences*—obtaining money by. (Id., 677, § 55; amended Laws of 1851, 268, ch. 144.)
- Forgery.* (2 R. S., 675, § 42.)
- of railroad tickets. (Laws 1855, ch. 499, §§ 4, 5.)
- Fraudulent* issuing and sale of bonds of incorporated companies by officers, &c. (Laws of 1855, 236, ch. 155, § 1.)
- of joint stock companies and corporations. (Id., § 2.)
- Gamblers*, and inveigling to gaming houses. (Laws 1851, ch. 504; amended by Laws 1855, ch. 214.)
- Incest.* (2 R. S., 688, § 12.)
- Injuries to railroads.* (Laws of 1838, 126, ch. 160.)
- Kidnapping.* (2 R. S., 664, § 30; 665, §§ 33, 34.)
- Larceny.* (Id., 679, §§ 65, 66.)
- Larceny* from the person. (Laws 1862, ch. 374, § 2.)
- in the night time. (2 R. S., 679, § 67.)
- Larceny* of railroad tickets. (Laws 1855, 914, ch. 499.)
- Larceny* of records. (2 R. S., 680, §§ 71, 72.)
- Misapplication of moneys* received under bounty law. (Laws 1864, ch. 72, § 3.)
- Manslaughter.* (2 R. S., 663, §§ 20, 21.)
- Masquerades* in New York and Brooklyn. (Laws 1829, ch. 270; amended 1858, ch. 359.)
- Mayhem.* (2 R. S., 664, § 29.)
- Mock auctions.* (Laws 1853, ch. 138.)
- Murder.* (2 R. S., 657, § 5; amended by laws 1862, ch. 197.)
- Passenger tickets* on vessels. (Found in Laws 1860, ch. 103, p. 107.)
- Perjury.* (2 R. S., 681, §§ 2, 4.)
- Poisoning food, springs, &c.* (Id., 665, § 40.)
- Producing pretended heir.* (Id., 676, § 53.)
- Rape.* (Id., 663, § 22.)
- Receiving property embezzled*, in upwards of \$25 in value. (Id., 678, § 63.)
- Receiving stolen goods.* (Id., 680, § 73.)
- Robbery.* (Id., 678, § 57.)
- Second offences.* (Id., 699, §§ 8, 9.)
- Second offence*, endeavoring to conceal death of child. (2 R. S., 694, § 23.)
- Seduction*, under promise of marriage. (2 R. S., 664, § 26; Laws of 1848, 148, ch. 111; 1849, 577, ch. 420, § 3.)
- Selling counterfeit notes.* (2 R. S., 672, § 32.)
- Severing from the soil* produce, &c., upwards of \$25 in value. (Id., 680, § 70.)
- Sodomy.* (Id., 689, § 20.)
- Subornation of perjury.* (Id., 681, §§ 2, 4.)
- Substituting child.* (Id., 676, § 54.)
- Steamboat and steamship tickets*—fraudulent sale of, in counties of New York, Albany and Erie. (Laws 1860, ch. 103, p. 177.)
- State officers* making false estimates, certificates, &c., of work on canals. (Laws 1854, ch. 329, § 12.)
- Salt works*—destroying. (Laws 1859, ch. 346.)
- Salt works*—counterfeiting, and assisting in counterfeiting brands of superintendent. (Id.)
- Threatening letters.* (2 R. S., 678, § 60.)
- Total erasure, &c.*, of instruments. (Id., 675, § 43.)

Treason. (Id., 656, § 2.)

Uttering counterfeits. (Id., 674, §§ 39, 40.)

Uttering instrument made in one's own name, as that of another person of the same name. (Id., 674, § 41.)

Violating graves, &c. (Id., 688, §§ 13-15.)

Voting at election by non-resident of the State. (Laws 1839, ch. 389, p. 365, § 14.)

Violation of Registry Law. (Laws 1859, ch. 380, p. 895, § 14.)

I. ARSON.

Arson was at the common law an offence of the degree of felony, and has been described as the malicious and willful burning the house of another.¹

This offence, at common law, was considered as one of great malignity, and pernicious to the public, and was punishable with death. It is frequently more destructive than murder itself, of which, too, it is often the cause, since murder, as atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends, as well as enemies.²

In this State, the crime of arson has been divided into degrees, and has been extended by statute from the burning of a human habitation, so to embrace the burning of other descriptions of property not involving danger to human life.

The following comprises the statutory definition of the various grades of arson, as created by our statute:

(a) *First Degree.*—Arson in the first degree consists in willfully setting fire to or burning in the night time a dwelling-house, in which there shall be at the time some human being, and every house, prison, jail, or other edifice, which shall have been usually occupied by persons, lodging therein at night, shall be deemed a dwelling-house of the person lodging therein.³

But no warehouse, barn, shed, or other outhouse, shall be deemed a dwelling-house, within the meaning of the last section, unless the same be joined to, immediately connected with and part of a dwelling house.⁴

¹ 2 Russ on Cr., 548; 3 Inst., 66; 1 Hale, 566; 1 Hawk. P. C., ch. 39; 4 Black. Com., 220; 2 East. P. C., ch. 21, § 1.

² 4 Black. Com., 220.

³ R. S., 657, § 9.

⁴ Id., § 10.

A knowledge that the building was occupied with human beings lodging there, either habitually or at the time, is immaterial. A design to produce death is not necessary to constitute the offence of arson in the first degree, either at common law or under the statute.¹

It was held in the Supreme Court, that a person cannot be convicted of arson in the first degree in setting fire to his own house; but he may be convicted of arson in the third degree in burning his own dwelling-house; but the offence is still against the property of another; the object of the crime being to defraud the insurer, who is interested in the preservation of the property.² And the rule also was at the common law, that if the mischief was done but to one's own house it did not amount to a felony, but firing one's own house in a town was a high misdemeanor.³ But the Court of Appeals subsequently overruled the decisions of the Supreme Court, and held that arson in the first degree, under our statute, might be committed by one in burning his own house.⁴

(b) *Second Degree*.—Every person who shall willfully set fire to or burn any inhabited dwelling-house in the day time which, if committed in the night time, would be arson in the first degree, shall, upon conviction, be adjudged guilty of arson in the second degree.⁵

So, also, every person who shall willfully set fire to or burn in the night time any shop, warehouse, or other building not being the subject of arson in the first degree, but adjoining to, or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree.⁶

The question as to what comprises a building within the curtilage of an inhabited dwelling-house, will be found stated in the subsequent section upon burglary.⁷

¹ *Peo. v. Orcutt*, 1 Park., 252; 2 Russ. on Cr., 252.

² *Peo. v. Henderson* 1 Park., 560; *Peo. v. Gates*, 15 Wend., 159.

³ 4 Blac. Com., 221. Vide *Peo. v. Bush*, 4 Hill, 133; 6 East., 464; *Holme's Case*, Cro. Cas., 376.

⁴ *Shepherd v. Peo.*, 19 N. Y. (5 Smith), 537.

⁵ 2 R. S., 666, § 1.

⁶ *Id.*, § 2.

⁷ Vide post.

(c) *Third Degree*.—Every person who shall willfully set fire to or burn in the day time any shop, warehouse or other building, which, if committed in the night time, would be arson in the second degree, shall, upon conviction, be adjudged guilty of arson in the third degree.¹

So, also, every person who shall willfully set fire to and burn in the night time the house of another not the subject of arson in the first or second degree, any house of public worship, or any school house, any public building belonging to the people of this State, or to any county, city, town, or village, or any building in which shall be deposited the papers of any public officer, or any barn, or grist mill, or any building erected for the manufactory of cotton or woollen goods, or both, or paper, iron, or any other fabric, or fulling mill, or any ship, or vessel, shall, upon conviction, be adjudged guilty of arson in the third degree.²

So, also, every person who shall willfully burn any building, ship, or vessel, or any goods, wares, merchandise, or other chattel, which shall at the time be insured, whether the same be the property of such person or another, shall, upon conviction, be likewise adjudged guilty of arson in the third degree.³

(d) *Fourth Degree*.—The following offenders are guilty of arson in the fourth degree:

1st. Every person who shall in the day time willfully set fire to, or burn any dwelling-house or building, ship or vessel, which, if committed in the night time, would be arson in the third degree.

2d. Every person who shall, in the day or night time, willfully set fire to, or burn any saw mill, any carding machine, or building containing the same, any stack of grain of any kind, or any stack of hay, not being the property of such person, any toll bridge or any other public bridge.

3d. Every person who shall willfully set fire to, or burn in the day or in the night any crop of grain, growing or standing in the field, or any nursery or orchard of fruit trees belonging to another, or any fence around any cultivated field belonging to another, or the woods in any town not belonging to himself, or any grass or herbage growing on any marshes or other lands not belonging to himself.⁴

¹ 2 R. S., 667, § 3.

² Id., § 4.

³ Id., § 5.

⁴ Id., §§ 6, 7, 8.

(e) *The act must be Willful and Malicious.*—By our statute, the words willfully and maliciously are used as necessary ingredients of the crime. This was also so at the common law, which held that the burning must be willful and malicious, for otherwise, it was only a trespass; and for that reason it was held that, if a person should, in shooting at game, happen to set fire to the thatch of a house, it would not be a burning of this description.¹

So, also, the setting fire by a prisoner to his cell is not arson, if the intent were merely to effect his own escape.²

The malicious and willful burning need not correspond with the precise intent or design of the party. As if A have a malicious intent to burn the house of B, and in setting fire to it, burn the house of C, or if the house of B escape by some accident, and the fire take in the house of C and burn it, this shall be said in law to be the malicious and willful burning of the house of C, though A did not intend to burn that house. So, also, it has been held that if a person set fire to a stack, the fire from which is likely to communicate to a barn, and it does so, and the barn is burnt, he is, in point of law, indictable for setting fire to the barn,³ for no man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended.⁴ Thus, at the common law, where the shooting at poultry, with intent to shoot them, was an act done with a felonious intent, it was said that the person who committed such act, and thereby set fire to the thatch of a house, that the first act being felonious, the party must abide all the consequences.⁵

And it has been held that such malicious and willful burning of the house of another, may be by means of setting fire to the party's own house; and this, though it should appear, that the primary intention of the party was only to burn his own house. If, in fact, other houses were burned, being adjoining, and in such a situation that the fire must, in all probability, reach them, the intent being unlawful and malicious, and the consequences immen-

¹ 3 Inst., 67; 4 Black. Com., 222; 1 Hale, 569.

² *Peo. v. Cottrell*, 18 John., 115.

³ 1 Hale, 569; 1 Hawk. P. C., ch. 3, § 19; 1 East. P. C., 21, § 7; 3 Inst., 67; Plowd., 475; *Hennessey v. The Peo.*, 21 How., 239.

⁴ 5 C. & P., 266, note.

⁵ 4 Black. Com., 222; 3 Inst., 67; 1 Hale, 569.

diately and necessarily following from the original act done, the offence will be felony.¹

The general rule of intent, applies in arson as in other crimes, that a person is presumed to intend the ordinary consequences of his acts, and it devolves upon a person charged with crime to rebut this presumption by evidence of a different intent.²

(f) *The Burning*.—In order to constitute a burning, so as to amount to arson at the common law, a bare intent or attempt to do it by setting fire to the house, unless it actually burnt, did not fall within the description of the words which were necessary in the days of law latin to all indictments for the offence;³ but it will be observed that our statute, in most instances, uses the words "set fire to or burn."

It is not necessary that the property should be wholly destroyed; the burning or consuming of any part is sufficient, though the fire be afterwards extinguished, and the offence is complete though the fire go out of itself.⁴

In order to constitute a setting on fire, it is not necessary that any flame should be visible.⁵

(g) *Of the Terms House, and Dwelling-house*.—In ascertaining the meaning of the term dwelling-house, which is used in the statute, cases of burglary are referred to in the books for a settlement of the term with respect to arson.⁶ This question will be found discussed in the subsequent section upon burglary.

The term house of another is also used in the statute. At the common law, the word house, in arson, had not the same significance as the word mansion-house when used in burglary.⁷ The word house extended not only to the dwelling-house but to all out-

¹ 2 Russ on Cr., 550; 2 East. P. C., ch. 21, § 8; Coke v. Woodburne, 6 Harg. St. Tr., 222.

² Peo. v. Orcutt, 1 Park., 252.

³ 4 Blac. Com., 222.

⁴ 4 Blac. Com., 222; 3 Inst., 66; Doct., 506; Peo. v. Cottarel, 18 John., 115; Peo. v. Butler, 16 John., 203; 4 City H. Rec., 77; 1 Hale, 568, 569; 1 Hawk., P. C., ch. 39, §§ 16, 17; 2 East., P. C., ch. 21, § 4; City H. Rec., 71.

⁵ R. v. Stallion, R. & M., C. C., 398. Vide Com. v. Van Schaack, 16 Mass., 105.

⁶ 2 East. P. C., 1020; Rex v. McDonald, 2 Lew. C. Cases 46; 2 Russ. on Cr., 489, note; 1 Hale P. C., 567, note.

⁷ 3 Inst., 67; Sum., 86; 2 Russ on Cr., 552.

houses which are parcel thereof, though not adjoining thereto or under the same roof.¹

It is said that what shall be termed a house or house of another has never been settled in this country. Upon this point recourse is had to the decisions of the English courts of justice.² But, on a trial for burglary, it has been held that the word house, in its primary and common acceptation, meant a dwelling-house.³

It will be observed that our statute declares, in its definition of arson in the first degree, that no warehouse, barn, shed, or other outhouse, shall be deemed a dwelling-house, or part of a dwelling-house, unless the same be joined to or immediately connected with and part of a dwelling-house, and, in a order to constitute arson in the second degree, the building set fire to must actually touch an inhabited dwelling-house, or be within the curtilage thereof; the word adjoining, as used in the statute, signifying in actual contact.⁴

Our courts have held that any building is a dwelling-house, within the act defining arson in the first degree, which is in whole or in part occupied by persons lodging therein at night, although other parts or the greater part may be occupied for an entirely different purpose.⁵

(h) *The Ownership of the House.*—At the common law the question of ownership was a material one, and questions of greatness and subtleness frequently arose for the purpose of distinguishing the person who might be said to occupy the premises in his own right. But our Supreme Court, after a detailed examination of the authorities upon this subject, held that the house or building set fire to must be described as the house or building of the person in possession; and it was accordingly held that where the building burned was alleged as the building of the owner, and the proof was that, at the time of the committing of the offence, it was in the possession of a tenant, that the accused could not be convicted.⁶

¹ 2 Russ. on Cr., 552; 3 Inst., 67; 1 Hale, 552; 1 Hawk. P. C., ch. 39, § 1; Sum., 86; 4 Blac. Com., 221; 2 East. P. C., ch., 12, § 5.

² *Peo. v. Davis*, 1 Whee. Cr. Cases., 239.

³ *Thompson v. Peo.*, 3 Park., 208.

⁴ *Peveilly v. Peo.*, 3 Park., 59.

⁵ *Peo. v. Orcutt*, 1 Park., 252.

⁶ *Peo. v. Gates*, 15 Wend., 158. Vide *Peo. v. Van Blaricum*, 2 John., 105.

Where the prisoner set fire to and burned the barn situated on the farm on which he at that time resided, working it on shares, and occupied the barn as a place of deposit for the crops raised on the place, it was held that he had no estate or legal possession of the barn, and that the barn was properly laid as the property of the landlord.¹

(i) *Day Time and Night Time.*—Lord COKE, in his definition of arson, made the common law offence complete, whether committed in the day time or night time. The statutes of this State, in their classification of the offence into degrees, make the question a material one, whether the offence be committed in the day or night time. For a proper distinction of these two terms the reader is referred to the subject upon burglary, where the distinction is explained.² It seems that anciently the day was accounted to begin only at sun rising and to end immediately upon sun set; but it was afterwards settled, as the better opinion, that if there were daylight or twilight enough began or left, whereby the countenance of a person might be reasonably discerned, it were day time.³

II. AGGRAVATED ASSAULTS.

(A) *Assaults with Intent to Commit Felonies.*

(B) *Assaults with Dangerous Weapons with Intent to do Bodily Harm.*

An assault is an attempt with force and violence to do a corporeal injury to another, and may consist of any act tending to such injury, accompanied with circumstances denoting an intent, coupled with a present ability to use violence against the person.⁴

Assaults, or assaults when committed with any atrocious design, are regarded as aggravated offences, and are punishable at common law, according to the circumstances of the case: such as assaults with intent to kill, to rob, to ravish, to maim, or to commit any felony.⁵

Under our statutes, aggravated assaults, so far as they are felonies, are classified into assaults with intent to commit felonies,

¹ *Peo. v. Smith*, 3 How., 226.

² *Vide post*.

³ 1 Hale, 550; 3 Inst., 63; 1 Hawk. P. C., ch. 38, § 2; 2 East. P. C., ch. 15, § 21; Sum., 79; 4 Blac., Com., 224.

⁴ *Hays v. The Peo.*, 1 Hill, 351. *Vide assaults, post*.

⁵ 2 Arch. Cr. Pr., 7th ed., 285, note.

and assaults with intent to do bodily harm. These two divisions of the offence will be taken up and spoken of separately.

(A) *Assaults with Intent to Commit Felonies.*

The statutes of our State divide assaults with intent to commit felonies into two distinct classes, one of which comprises that class of offences where there is a simple assault, with such felonious intent; and the other, where the assault is aggravated by shooting, or attempting to discharge fire arms, or air guns, or where it is committed by means of any deadly weapon, or by such other means or force as was likely to produce death. The provisions of the statute in the respects above mentioned, are as follows:

Every person who shall be convicted of an assault with intent to commit any robbery, burglary, rape, manslaughter or any other felony, the punishment for which assault is not otherwise prescribed by statute, shall be punished by imprisonment in a State prison for a term not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.¹

Every person who shall be convicted of shooting at another, or attempting to discharge any kind of fire arms, or any air gun at another, or of any assault and battery upon another by means of any deadly weapon, or by such other means or force as was likely to produce death, with the intent to kill, maim, ravish or rob such other person, or in the attempt to commit any burglary, larceny or other felony, or in resisting the execution of any legal process, shall be punished by imprisonment in a State prison.²

(a) *Of the Intent.*—The intention of the accused in all these cases, is of the gist of the offence. It is to be presumed, from the acts and words of the prisoner, or from other circumstances. It is not, in general, capable of positive proof. If it cannot, from the facts and circumstances which together with it constitute the offence, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial.³

¹ 2 R. S., 665, § 41.

² 2 R. S., 665, § 38.

³ Arch. Cr. Pr., 104.

In cases of assaults with intent to kill, it is obviously of importance to consider the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses, and the acts which he does. If, with a deadly weapon he deliberately inflicts a wound upon a vital part, where such wound would be likely to prove fatal, a strong inference results that his mind and intention were to destroy.¹

(b) *Assault with Intent to Rob.*—Among the principal assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent to commit a robbery.² As an assault is an attempt to commit a forcible crime against the person of another, therefore an assault with intent to commit robbery, is nothing more than an endeavor to commit a robbery; and consequently, in order to maintain this charge, for the assault with an intent, etc., it is not necessary to prove an assault in the vulgar and ordinary acceptation of the term, namely, an attempt to commit a robbery; but all that is necessary on the part of the prosecutor to prove is, that the prisoner intended to rob him, and that he did some act in the presence of the prosecutor, for the purpose of effecting the robbery intended. The intention must, of course, be proved from some overt act, or expressions of the defendant, and the overt act will also prove the assault as well as the intention.³

The intent to rob will be gathered from the general conduct of the prisoner at the time: menaces, threats, violence, and in short whatever conduct, if it had been followed by a taking of property, would have constituted robbery, will, in this, be evidence of an intent to rob.⁴

The assault must be upon the person intended to be robbed. Where the assault was upon a post-boy driving a carriage, and the intention was to rob a gentleman in the carriage, the court held the indictment could not be sustained.⁵ The intent to rob

¹ 2 Stark. Ev., 500, 2d ed.

² 2 Arch. Cr. Pro., 426, note.

³ 2 Arch. Cr. Pro., § 426.

⁴ Idem, vol. 2, 539, notes.

⁵ 1 Leach, 380.

is a material part of the offence, and should be alleged in the indictment.¹ No actual demand of money is necessary upon the charge of assault with intent to rob.²

(c) *Assault with Intent to Kill*—Where the prisoner is charged with an assault and battery with a deadly weapon, with intent to kill, it is sustained by proof of having done the act with intent to commit any felonious homicide; it is not necessary to prove an intent to murder.³ And upon an indictment, charging this offence, the presumptions as to malice are the same as in murder. Thus, where the prisoner was the aggressor, and commenced the attack, and made use of such weapons as were calculated to endanger life, it was held that malice would be inferred, and that the fact that the prisoner was in the heat of passion would not mitigate the offence into a lesser crime.⁴

An assault and battery with intent to kill is not a felony by our statute or at the common law, unless committed with a deadly weapon, or by such other means or force as are likely to produce death.⁵

A conviction for attempting to discharge a pistol with intent to kill, cannot be had under the statute where the individual indicted proceeded no farther toward an actual discharge or shooting than to raise and point the pistol, uncocked, at the party threatened; a threat made by the prisoner at the time would constitute no part of the attempt to discharge the pistol, it would only be evidence of the intention of the prisoner.⁶

Under the English statute, in relation to attempts at murder, which was a repeal of the acts previously known as the Black act and as Lord ELLENBOROUGH's act,⁷ in the section, in relation to shooting at persons, the word "loaded arms" is used; and it was held, in a prosecution for an offence under Lord ELLENBOROUGH's act, the words of which were substantially the same, that it was not necessary to allege or prove that the gun contained any ball or shot, but that if it was loaded with powder and wadding only,

¹ 6 Serg. & Rawle, 398; 1 Russ on Cr., 767.

² 1 Russ on Cr., 766.

³ *Peo. v. Shaw*, 1 Park., 327.

⁴ *Peo. v. Vinegar*, 2 Park., 24.

⁵ *O'Leary v. Peo.*, 4 Park., 187.

⁶ *Mulligan v. Peo.*, 5 Park., 105.

⁷ 9 George IV., ch. 31; 1 Russ. on Cr., 721.

or if the prisoner fired it so near the person of the prosecutor and in such a direction that it would probably kill him, that it would come within that statute.¹

(d) *Assault with Intent to Ravish*.—There are many cases where an attempt to commit a rape must, in the real estimate of guilt, be considered nearly as aggravated an offence as if the crime had been completed; more especially where brutal force and violence is used to effect the criminal purpose.²

To constitute an assault with intent to commit a rape, it is necessary that the facts and circumstances, accompanying the transaction, should be such as to constitute the crime of rape, in case the defendant had succeeded and carried his intention into full effect.³

In order to convict of such an assault, the jury must be satisfied that the prisoner intended to gratify his passions on the person of the prosecutrix at all events, and notwithstanding any resistance on her part. Upon an indictment for an assault with intent to commit a rape, PATTERSON, J., in summing up, said: "In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events and notwithstanding any resistance on her part."⁴ It was held by the same judge, in the same case, that evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix was not admissible to show the prisoner's intent.⁵

Where, upon an indictment for an assault with intent to commit a rape, the evidence was that the defendant, a medical man, being about to administer an injection to the prosecutrix, desired her to place her head on the bed and her feet on the floor, he then raised her clothes, and administered the injection, and desired her to remain still; but she found then that he was about to have connection with her, and had penetrated her person a little, when she immediately arose and ran down stairs, and he

¹ Kitchen's Case, *Rus. & Ry.*, 95. Vide *Vaughn v. State*, 3 Sm. & Marsh, 553.

² 2 Arch. Cr. Pr., 179.

³ 3 Engl. Ark. Rep., 400.

⁴ 1 Russ. on Cr., 693; *Rex v. Lloyd*, 7 C. & P., 318.

⁵ *Id.*

quitted the house. COLERIDGE, J., held, that if this had been committed with force the offence of rape would have been committed; but as that was not the case, the defendant could not be convicted of an assault with intent to commit a rape; although what he did was sufficient to convict him in a court for a common assault.¹

When the prisoner decoyed a female, under ten years of age, into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, held that, though there was no evidence of his having actually touched her, he was properly convicted for an assault with intent to commit a rape.²

The question has arisen, whether a boy under fourteen years could be convicted of assault with intent to commit a rape. In *Eldersham's* case, above cited, it was held by VAUGHAN, B., that a boy, under the age of fourteen, could not be convicted of an assault with intent to commit a rape. In *Rex v. Gravenbridge* the same rule was adopted, as it was likewise held by PATTERSON, J., in *Phillip's* case. The Supreme Court of Massachusetts decided to the reverse; the court saying an intention to do an act does not necessarily imply an ability to do it.³ In this State, upon a review of these cases, it was held that the guilty intent which, under the statute, aggravated a simple assault and battery, and made it punishable as a felony, could not exist where there was a physical incapacity, presumed by law of the person charged, to consummate the offence alleged to have been intended; the intent was simply a thought or desire, which could not, in the nature of things, produce any result; the highest offence of which the party was capable being an assault and battery, as determined by the law itself.⁴

(e) *Assault with Intent to Commit Larceny*.—Independent of the general statute above cited, in reference to assaults with intent to commit felonies, the Legislature, in the act of 1862, after declaring larceny from the person to be grand larceny, though the value of the property taken shall be less than twenty-five dollars, enacted the following provision:

¹ *R. v. Stanton*, 1 Car. & K., 415.

² *Hays v. The Peo.*, 1 Hill, 351.

³ *Com. v. Green*, 2 Pick., 380.

⁴ *Peo. v. Randolph*, 2 Park., 213.

"Any person who shall lay hands upon the person of another, or upon the clothing upon the person of another, with intent to steal, under such circumstances as shall not amount to an attempt to commit larceny, shall be deemed guilty of an assault with intent to steal, and shall be punished as is by law provided for the punishment of misdemeanors; and it shall not be necessary to allege or prove, in any prosecution for an offence under the above section of the statute, any article intended to be stolen, or the value thereof, or the name of the person so assaulted."¹

(f) *Assaults in Resisting the Execution of Legal Process.*—The obstruction of the execution of lawful process is an offence against public justice of a very high and presumptuous nature, and more particularly so when the obstruction is of an arrest upon criminal process.² An assault upon an officer in the execution of the duties of his office, is always punished with severity, as being a direct attack upon government, and a blow aimed at the law itself.³

In pronouncing sentence in a case of this kind, the presiding judge admonished the convict to beware of similar acts hereafter. It was of small consequence in the case that a rescue was not effected, or that the constable was not beaten or injured. The offer to rescue the prisoner, the threat to injure the officer if he did not release his prisoner, and the attempt to raise a mob to accomplish the object, evinced a disregard for the laws which called for exemplary punishment. The judge told the prisoner that every attempt to resist the officers of justice, must be regarded as an attempt to trample down all the institutions relied upon by society for the promotion of happiness, and the preservation of life, liberty and property, and that such attempts could receive no countenance from the court, and that every effort should be made to preserve the supremacy of the laws.⁴

It will be observed that the statute creates this offence only when the act is committed in the execution of *legal* process. By legal process, is meant that the process must not be deficient in the frame of it, and must issue in the ordinary course of justice from a court or magistrate having jurisdiction of the case.

¹ Laws 1862, ch. 374, § 3.

² 4 Black. Com., 128; 2 Hawk. P. C., ch. 17, § 1; 1 Russ on Cr., 408.

³ 2 Arch. Cr., 290, note.

⁴ Com. v. Vance, Lew Cr. L., p. 102.

The falsity of the charge contained in the process, will afford no excuse for assaulting the officer, for every man is bound to submit himself to the course of justice.¹

Neither will the fact that there may have been error or irregularity in the proceeding previous to the issuing of the process, be an excuse for an assault upon the officer executing it, for the officer to whom it is directed must, at his peril, pay obedience to it.²

The party should have notice of the officer's business, as where a bailiff rushed into a gentleman's bed-chamber early in the morning, without giving the slightest intimation of his business, and, the gentleman not knowing him, in the impulse of the moment, assaulted him, he was considered not guilty of the offence.³

But where it appeared that the defendant knew the officer, or he notified the defendant, and showed him his process, it was held different.⁴

(B) Assaults with Dangerous Weapons with Intent to do Bodily Harm.

Any person who, with intent to do bodily harm, and without justifiable or excusable cause, shall commit any assault upon the person of another with any knife, dirk, dagger or other sharp, dangerous weapon, or who, without such justifiable or excusable cause, shall shoot off or discharge at another with intent to injure such other person, any air gun, pistol or other fire arms, although without intent to kill such other person, shall, upon conviction, be punished by imprisonment in a State prison for a term not more than five years, or by imprisonment in the county prison for a term not exceeding one year.⁵

III. ATTEMPTS TO COMMIT FELONIES.

(a) At the common law an attempt to commit any felony, or even a misdemeanor, was itself a misdemeanor,⁶ and all attempts tending to the prejudice of the community were indictable,⁷ and,

¹ 1 East. P. C., 310.

² 1 Hale, 457; Fost., 311.

³ 1 Hale, 470.

⁴ Cro. Cas., 183; 1 Hale, 461.

⁵ 2 R. S., 689, § 24; Laws 1854, ch. 74, § 1.

⁶ 2 East, R., 8; 6 Id., 464; 1 Russ. on Cr., 47.

⁷ R. v. Phillips, 6 East., 464; 4 Burr, 2494; 2 Camp., 229; 2 Ld Raym., 1377; 2 East., 14-16, 22-25; 3 Inst., 147.

as was observed by one of the older criminal writers, so long as an act rests in bare intention it is not punishable, but immediately when an act is done the law judges not only of the act done but of the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would have been otherwise innocent, the intent being criminal, the act becomes criminal and punishable.¹

Our statutes, however, with the exception hereafter noted, have made the attempting to commit an offense prohibited by law a felony, when the offence so attempted was itself a felony. The following is the language of the statute:

"Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof are to be punished as prescribed by the Revised Statutes."²

The punishment above referred to, in all cases where the offence so attempted to be committed was a felony, is by imprisonment in a State prison, except where the offence so attempted is punishable by imprisonment in a State prison for any term less than four years; in which case the person convicted of such attempt is to be sentenced to imprisonment in a county jail for not more than one year; therefore an attempt to commit a felony, which felony must be punished by imprisonment in a State prison for any term less than four years, is not a felony.³

Under the subdivision last above referred to, it was held that the power to punish by imprisonment in a State prison, upon conviction for an attempt to commit a crime, is not limited to those cases where the imprisonment in a State prison, if the crime attempted had been consummated, must be four years or more; but in all cases where the crime attempted may be punished four years or more in a State prison, the court may sentence the convict to imprisonment in a State prison for a time not exceeding one half of the longest time of imprisonment prescribed for a conviction of the offence attempted.⁴

¹ 1 Russ. on Cr., 47.

² 2 R. S., 698, § 3. Vide ante.

³ 2 R. S., 698, § 3, sub. 2.

⁴ Mackay v. Peo., 1 Park., 459.

An attempt may be immediate; an assault, for instance, but it very commonly means a remote effort or indirect measure taken, with intent to effect an object.¹

It was said at an early day, that an act done and a criminal intent joined to that act, were sufficient.²

And more recently it was said that an attempt can only be made by an actual ineffectual deed done, in pursuance of and in furtherance of the design to commit the offence.³

Thus in one case, under the English statute, the judge said the act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution.⁴ In the court of criminal appeal in England, the chief justice said: I think, attempting to commit a felony, is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged.⁵

In an indictment under our statute above referred to, the particular manner in which the attempt was made is immaterial, and need not be alleged. Merely soliciting one to commit a felony, without any other act being done, is sufficient to warrant a conviction under the statute. Thus, where on the trial of an indictment under this statute, for an attempt to commit arson, it was shown that the prisoner solicited one K to set fire to a barn, and gave him materials for the purpose, it was held enough to warrant a conviction, though the prisoner did not mean to be present at the commission of the offence, and K never intended to commit it.⁶

Besides the general statute above mentioned in relation to attempts to commit felonies, there are special enactments of the Legislature in relation to the attempting to commit specific offences, which will be noticed in connection with such offences. Where the attempt is connected with an assault, either with or without weapons, has already been spoken of. No person can be

¹ Vide for illustrations, *Rex v. Higgins*, 2 East., 5.

² 2 Stra., 1074; 1 Russ on Cr., 48; Hardw., 370.

³ Uhl. v. Com., 6 Grat., 672.

⁴ *R. v. Taylor*, 1 F. & F., 5.

⁵ *R. v. McPherson*, Dears & B. C. C., 197.

⁶ *Peo. v. Bush*, 4 Hill, 133.

convicted of an assault with intent to commit a crime, or of any other attempt to commit an offence, when it shall appear that the crime intended, or the offence attempted, was perpetrated by such person at the time of such assault, or in pursuance of such attempt.¹

Nor if acquitted or convicted of the principal offence, shall he be tried or convicted for any attempt to commit the offence charged in the indictment.²

(b) With respect to persons having implements for house-breaking, etc., in their possession, with felonious intent, the Legislature has made the following provisions:

If any person in this State who shall be found by night armed with any dangerous or offensive weapon, or instrument whatsoever, with intent to break or enter into any dwelling-house, building, room in a building, cabin, stateroom, railway car, or other covered enclosure where personal property shall be, and to commit any larceny or felony therein, or with the intent to commit any larceny or felony, or if any person shall be found by night having in his possession any picklock, crow key, bit, jack, jimmy, nippers, pick, betty, or implements of burglary, with the intent aforesaid, or if any person shall be found in any dwelling-house, building or place where personal property shall be, with intent to commit any felony or larceny therein, under such circumstances as shall not amount to an attempt to commit felony, every such offender shall be deemed guilty of a misdemeanor; but if any person shall commit any such offence after a previous conviction, either for felony or petit larceny, or such misdemeanor as aforesaid, he is to be deemed guilty of a felony.³

This statute is modelled after the English act of Victoria, and in the English courts it was held that keys are implements of house-breaking, for though commonly used for lawful purposes, they are capable of being employed for purposes of house-breaking; and it is a question for the jury, whether the person found in possession of them by night, had them without lawful excuse, and with the intention of using them as implements of house-breaking.⁴

¹ 2 R. S., 702, § 36.

² Id., § 38.

³ Laws 1862, ch. 374, § 1, p. 627.

⁴ R. v. Oldham, 2 Den. C. C. R., 472.

And it was further held under the English statute, that this offence consists in the possession merely, without lawful excuse, of the implements mentioned, and that it is not necessary to allege, or prove at the trial, an intent to commit a felony.¹ But it is to be observed that the English statute contained the words, "having in his possession without lawful excuse (the proof of which shall lie on such person)," which words are wanting in our statute.

(c) Every person who shall knowingly send or deliver, or shall make, and, for the purpose of being delivered or sent, shall part with the possession of any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, or with any letter mark, or other designation, threatening therein to accuse any person of any crime, or to do any injury to the person or property of any one, with a view or intent to extort or gain any money or property of any description belonging to another, shall, upon conviction, be adjudged guilty of an attempt to rob.²

The statute against sending threatening letters with the view of extorting money, etc., was intended to embrace only cases where the intent is to obtain that which in justice and equity the writer of the letter is not entitled to receive. It does not extend to cases where the person threatened actually owes the writer of the letter the sum claimed by him.³

(d) Every person who shall, by the offer of any valuable consideration, attempt unlawfully and corruptly to procure any other to commit willful and corrupt perjury as a witness in any cause, matter or proceeding, in or concerning which such other person might by law be examined as a witness, is also guilty of a felony.⁴

IV. ABANDONING CHILDREN.

If the father or mother of any child under the age of six years, or any other person to whom such child shall have been confided, shall expose such child in any highway, street, field, house, or outhouse, with intent wholly to abandon it, he or she shall,

¹ R. v. Bailey, 1 Dears' C. C. R., 244.

² 2 R. S., 678, § 60.

³ Peo. v. Griffin, 2 Barb., 427.

⁴ 2 R. S., 682, § 8.

upon conviction, be punished by imprisonment in a State prison or in a county jail.¹

As in other criminal offences, the intent of the accused constitutes the material part of the crime. In this instance the intent is wholly to abandon the child.

V. ABDUCTION OF FEMALES.

The provisions of the statute in this respect embrace three classes of offences. 1st. The abduction of females, under the age of fourteen years, for the purpose of prostitution or marriage. 2d. The abduction of females, under the age of twenty-five years, for prostitution. 3d. The taking of a woman by force, menace or duress, and against her will, to be defiled or married.

The following are the provisions of the Revised Statutes upon the subject:

(a) Every person who shall take away any female, under the age of fourteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, concubinage, or marriage, shall, upon conviction thereof, be punished by imprisonment in a State prison not exceeding three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.²

At the common law, if children were taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, such criminal means was an offence, though the parties themselves consented to the marriage.³ Under this section of the statute the violation of the girl's will is unnecessary; the object of the provision is to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises, or gifts, and married in a secret way to their disparagement.⁴

Under the English statute, which was similar to ours, it was argued that, though by the statute a taking by force is not neces-

¹ 2 R. S., 665, § 37.

² 2 R. S., 664, § 28.

³ 1 Russ. on Cr., 701; 1 East. P. C., ch. 11, § 9.

⁴ Hicks v. Gore, 3 Mod., 84.

sary. still a person cannot in any sense be said to be taken who goes willingly, and that the word "take" in itself imports the use of some coercion; but this view has not been adopted. Thus, where A went in the night to the house of B, and placed a ladder against the window, and held it for F, the daughter of B, to descend, which she did, and then eloped with A; this was held to be a taking of F out of the possession of her father within the statute, although F had herself proposed to A to bring the ladder and elope with him.¹

And in another case, where the prisoner intending to emigrate to America, had privately persuaded a girl, between twelve and thirteen years of age, to go with him, and on the morning of his departure had secretly told her to put her things in a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two traveled up to London together; this was held to be a taking. The chief justice, in delivering judgment in this case, said there are two points in this case. The first turns on the construction of the word "take" in the statute. It is contended for the prisoner, that the word "take" must mean taking by force, actual or constructive. But a comparison of the sections shows that it is not necessary. It is unimportant, under the section on which this indictment was found, whether the girl consented or not to go away with the man. There can be no question upon the facts stated in this case, that when the prisoner met the girl at the appointed place, there was then a taking of her. The statute was framed for the protection of parents.²

In another case it was said a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute.³

It is no excuse for the defendant that, being related to the girl's father, and frequently invited to the house, he made use of no other seduction than the common blandishments of a lover to

¹ R. v. Robins, 1 C. & K., 456, 47 E. C. L. R.

² R. v. Mankletow, 1 Den. C. C. R., 159; S. C., 22; L. J. M. C., 115.

³ R. v. Hendley, 1 F. & F., 648.

duce the girl secretly to elope and marry him, if it appear that was against the consent of her father.¹

Under the English statute, where the words of the act were take out of the possession of her father," etc., it was held that: the actual possession of the father or other person, is not necessary, and though the girl may leave home of her own accord, still that possession continues in law until put an end to by the accused taking the girl into his own possession.

(b) Any person who shall inveigle, entice or take away any unmarried female of previous chaste character, under the age of twenty-five years, from her father's house, or wherever else she may be, for the purpose of prostitution at a house of ill-fame, signation or elsewhere, and every person who shall aid or assist in such abduction for such purpose, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment in a State prison not exceeding two years, or by imprisonment in a county jail not exceeding one year.²

Like seduction under promise of marriage, indictments for this offence must be found within two years after the commission hereof, and no conviction can be had on the testimony of the female so enticed or inveigled away, unsupported by other evidence.³

Under this section of the statute, the words previous chaste character, mean actual personal virtue in the female; and to sustain an indictment, it is necessary that she should have been chaste, and pure in conduct and principle up to the time of the commission of the offence, or the commencement of the acts on the part of the accused, which resulted in the abduction of the female. The word previous, in this connection, must be understood to mean immediately previous, or to refer to a period terminating immediately previous to the commencement of the guilty conduct of the defendant; and although the female has previously fallen from virtue, yet, if she has subsequently reformed, and become chaste, she may become the subject of the offence declared in the statute. The prostitution intended by the statute, was that of the female to the lustful appetites of men, at any place where prosti-

¹ R. v. Twistleton, 1 Hawk. P. C., ch. 41, § 10; 1 Sid., 387; Keb., 432; Russ, 712; 14 Ev., 257.

² 2 R. S., 664, § 27; Laws 1848, ch. 105.

³ Idem.

tution of the character common at houses of ill-fame or assignation is practiced; and in order to constitute the offence, the abduction of the female must be for the purposes of her indiscriminate meretricious commerce with men, and such must be the case to make her a prostitute, or her conduct prostitution, within the act, accordingly, where it was proved that the female, when she left her home, went voluntarily, and not at the instance of the defendant; and that she had since lived and cohabited with him, and with no one else, it was held that an indictment would not lie for her abduction.¹

(c) Every person who shall take any woman unlawfully against her will, and by force, menace or duress compel her to marry him, or to marry any other person, or to be defiled, is guilty of a felony; so, also, is every person who shall take any woman unlawfully against her will with the intent to compel her by force, menace or duress to marry him, or to marry any other person, or to be defiled.²

Under this section the age of the woman is an immaterial part of the offence; the gist of the offence being that it was perpetrated against the will of the woman abducted, and it may be either for the purpose of marriage or defilement.

Under the first section above cited, the fact that the age of the female is under fourteen years is material; the abduction must be without the consent of the person having her legal charge, and it may be for the purposes either of prostitution, concubinage or marriage, and under the second section the age of the female must be under twenty-five years; she must have been of previous chaste character, and the purposes of the abduction must have been for prostitution.

VI. ABORTION.

This offence may be defined to be the premature exclusion of the human foetus after the period of quickening; which, when procured or produced with a malicious design or for unlawful purposes, is a criminal offence.³

At the common law, it was no offence to perform an operation upon a pregnant woman by her consent, for the purpose of pro-

¹ *Carpenter v. Peo.*, 8 Barb., 603; 12 Met., 93.

² 2 R. S., 664, §§ 24, 25.

³ 1 Russ. on Cr., 671.

uring an abortion, and thereby succeed in the intention, unless the woman was quick with child. The act was injurious only as it affected injuriously the unborn child. If before the mother had become sensible of its motion in the womb, it was not a crime; if afterwards, when it was considered by the common law that the child had a separate and independent existence, it was held highly criminal.¹

In common understanding, a woman is not considered to be quick with child till she herself has felt the child alive and quick within her, which happens with different women in different periods of pregnancy, though usually about the sixteenth or eighteenth week of the conception.²

It was anciently supposed that the foetus become animated at the period of quickening; but this idea is now exploded. Physiology considers the foetus as much a living being immediately after conception as at any other time before delivery.³

The offence of abortion by our Revised Statutes is made of the grade of manslaughter, and will be found spoken of in the subsequent section, in relation to that offence.⁴ The administering of drugs, etc., with intent to cause a miscarriage, will be found under the head of misdemeanors.⁵

VII. BIGAMY.

The offence of having a plurality of wives at the same time is more correctly termed polygamy, but the name bigamy having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title.⁶ The offence was originally considered as of ecclesiastical cognizance only.⁷

It is a gross violation of moral decency, and has, in most countries, been severely punished; and it is proper that it should be made highly penal by statute, for few crimes can have a more fatal tendency, either as to public example or private suffering.⁸

¹ Com. v. Parker, 9 Met., 263.

² Rex v. Phillips, 3 Camp. R., 74.

³ Dean Med. Jur., 128, 129.

⁴ Post.

⁵ Post.

⁶ 1 Russ. on Cr., 186; 5 Mod., 18; 1 T. R., 748.

⁷ 1 Russ. on Cr., 186.

⁸ Peo. v. Wiggins, 1 Whee. Cr. Cases, 117.

The provisions of our statute, in relation to this offence, are as follows:

Every person having a husband or wife living who shall marry any other person, whether married on single, shall, except in the cases hereinafter specified, be adjudged guilty of bigamy.¹

The exceptional persons and cases above mentioned, to whom the above statutory provision in relation to bigamy, does not extend, are the following:

1. To any person, by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years without being known to such person, within that time to be living.

2. To any person by reason of any former marriage, whose husband or wife by such marriage shall have absented himself or herself from his wife or her husband, and shall have been continually remaining without the United States, for the space of five years together.

3. To any person by reason of any former marriage which shall have been pronounced void by the sentence or decree of a competent court, for some cause other than the adultery of such person.

4. To any person, by reason of any former marriage which shall have been pronounced void, by the sentence or decree of a competent court, on the ground of the nullity of the marriage contract.

5. To any person, by reason of any former marriage contracted by such person within the age of legal consent, and which shall have been annulled by the decree of a competent court.

6. To any person, by reason of any former marriage with a husband or wife who shall have been sentenced to imprisonment for life.²

An indictment may be found against any person, for a second, third or other marriage, prohibited by the statute, in the county in which such person shall be apprehended, and the like trial, proceedings, judgment, and conviction may be had in such county as if the offence had been committed therein.³

It is further provided by statute, that if any unmarried person

¹ 2 R. S., 687, § 8.

² 2 R. S., 688, § 9.

³ 2 R. S., 688, § 10.

shall knowingly marry the husband or wife of another, in any case in which such husband or wife would be punishable according to the provisions of the statute above cited, such person, upon conviction, shall also be guilty of a felony.¹

Though the first marriage be contracted under any of those disabilities which render it voidable, yet a second marriage, while the former is subsisting in fact, comes within the statute; for the first marriage is a marriage in judgment of law until it is avoided.²

A great deal of learning is to be found in the English books, as to what, under their ecclesiastical law, constitutes a valid marriage; but the Court of Appeals in this State have held that it is a sufficient actual marriage to support an indictment for bigamy, that the parties agree to be husband and wife, and cohabit and recognize each other as such. It is immaterial whether a person, who pretended to solemnize the contract, was or was not a clergyman or magistrate, or whether either party was deceived by his false representation of that character.³

The fact that the former marriage has been dissolved by decree of court subsequent to the second marriage, is no defence to an indictment for bigamy. The exception in the Revised Statutes contemplates a divorce prior to the second marriage.⁴

The laws of this State have no extra territorial force, and a second marriage out of the State, though followed by cohabitation within the State, is not indictable as a crime. Bigamy is made criminal in order to protect the innocent against the wiles of the guilty; but the State owes no duty, and can afford no protection to subjects of a foreign State, dwelling in the territory of their own government. Therefore, where the prisoner married a wife in Pennsylvania, and afterwards, while she was still living in Pennsylvania he married another wife in Canada, and came to this State to reside with her, it was held not bigamy.⁵

It is not bigamy within our statute for a person divorced on the ground of his own adultery, to marry again. After such a divorce, the defendant can no longer be said to have a wife living.

¹ 2 R. S., 688, § 11.

² 1 East. P. C., 466.

³ *Hayes v. Peo.*, 25 N. Y., 390; 15 Abb., 163; 5 Park., 325.

⁴ *Baker v. Peo.*, 2 Hill, 325.

⁵ *Peo. v. Mosher*, 2 Park., 195.

The terms husband and wife are only applicable while the marriage relation continues, and after a divorce neither party has a husband or wife. This was so held, notwithstanding the exception mentioned in the Revised Statutes.¹

But one of the sections of the act concerning divorces, declaring that after a divorce on the ground of adultery, the complainant may marry again, but that the defendant or guilty party cannot marry again during the life of the complainant, the second marriage in such a case as the one last above mentioned, may be punished as a misdemeanor.²

VIII. BRIBERY.

The offence of bribery at the common law consists in the receiving or offering any undue reward by or to any person whatsoever whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office and incline him to act contrary to the known rules of honesty and integrity.³

It was held in England that this offence will be committed by any person in an official situation who shall corruptly use the power or interest of his place for rewards or promises, as in the case of one who was the clerk to the agent for French prisoners of war, and was indicted for taking bribes in order to procure the exchange of some of them out of their turn.⁴

Closely connected with the offence of bribery is what is termed embracery, by improperly working upon the minds of jurors, for which see the subsequent chapter upon misdemeanors.⁵

Our statute upon the subject of bribery is as follows:

Every person who shall promise, offer, or give, or cause, or aid or abet in causing to be promised, offered or given, or furnish or agree to furnish, in whole or in part, to the Governor or Lieutenant Governor, or to any member of the Senate or Assembly of this State, after his election as such member, and either before or after he shall have qualified and taken his seat, or to any clerk or other officer of the Senate or Assembly, or to any commis-

¹ *Peo. v. Hovey*, 5 Barb., 117.

² *Idem*; 2 R. S., 146, § 61; *Id.*, 696, § 54.

³ 3 Inst., 149; 1 Hawk. P. C., ch. 67, § 2; 4 Bla. Com., 139.

⁴ *Rex v. Gibbs*, 1 East. R., 183; *R. v. Vaughan*, 4 Burr., 2494.

⁵ Post.

sioner of the land office or of the canal fund, or any canal commissioner or canal appraiser, to the comptroller, surveyor general, State engineer and surveyor, secretary of State, attorney general or superintendent of the banking department; to any judge of any court of record, or to any judicial officer whatever; to any member of the common council or corporation of any city in this State, or to any mayor, recorder, chamberlain, treasurer or comptroller of such city, or to any other officer of such city, or of any department of the government thereof, any money, goods, right in action or other property, or anything of value, or any pecuniary or other individual advantage, present or prospective, with intent to influence his vote, opinion, judgment or action, upon any question, matter, course or proceeding which may be then pending or may by law be brought before him in his official capacity, shall, upon such conviction, be imprisoned in a State prison or shall be fined not exceeding five thousand dollars, or both, in the discretion of the court.¹

Every officer in the last section enumerated who shall accept any such gift, thing of value or advantage, or any promise or undertaking to make or furnish the same under any agreement or understanding that his vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question, matter, cause or proceeding then pending or which may by law be brought before him in his official capacity, or shall directly or indirectly demand, require, propose to receive, receive or entertain any negotiation or proposition for any such gift, thing of value or advantage, as a consideration or motive for his official vote, action or influence, shall, upon conviction, be forever disqualified from holding any public office, trust or appointment under the constitution or laws of this State, and shall be punished by imprisonment in a State prison, or by a fine not exceeding five thousand dollars, or both, in the discretion of the court.²

If any person drawn or summoned as a juror, or if any person chosen as an arbitrator, or appointed a referee, shall take anything to give his verdict, award or report, or shall receive any gratuity or gift whatever from any party to any suit, proceeding

¹ 2 R. S., 682, § 9; Laws of 1853, ch. 539, § 1.

² 2 R. S., 683, § 10; Laws of 1853, ch. 539, § 1.

or prosecution, for the trial of which such person shall have been drawn or summoned, or for the hearing of which he shall have been chosen an arbitrator or appointed a referee, he shall, on conviction, be punished by imprisonment in a State prison or in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.¹

Every person who shall corrupt or attempt to corrupt any other, drawn or summoned as a juror, appointed a referee, or chosen an arbitrator, by giving or offering to give any gift or gratuity whatever, with intent to bias the mind of such juror, referee or arbitrator, in relation to any cause or matter which may be pending in the court to which such juror shall have been summoned, or in which such referee or arbitrator shall have been chosen or appointed, shall, on conviction, be imprisoned in a State prison or in a county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.²

Every person who shall knowingly bear or convey any such gift, gratuity or proposal, or shall in any manner negotiate between any other persons for any act in violation of either of the provisions of the preceding sections, shall, upon conviction, be punished in like manner and to the same extent as the principal offenders respectively would be liable to be punished under the preceding provisions for committing such act, except only the disqualification and forfeiture of office above mentioned.³

Every person offending against either of the provisions of the statute, in relation to the offences of bribery and corruption, is a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate, or grand jury, or in any court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.⁴

Persons offending against the provisions of the act in relation to bribery may be indicted, tried and convicted in the county in

¹ 2 R. S., 683, § 11.

² 2 R. S., 683, § 12.

³ 2 R. S., 683, § 13.

⁴ 2 R. S., 683, § 14; Laws 1853, ch. 539.

which such offence shall be committed, or in an adjoining county.¹

In any prosecution for the above mentioned offences, if any person shall refuse, or, without just cause, shall omit to appear, or to produce any paper or writing before any magistrate, or grand jury, or in court, according to the requirements of a subpoena for that purpose duly served upon him, or if any competent witness there present shall, when duly required, refuse or omit to testify, the magistrate or court in which such prosecution shall be pending, may, in addition to any other punishment authorized by law for a criminal contempt of court, order such person or witness to be imprisoned until he shall consent to appear and testify, or produce such paper or writing, and may, in its discretion, order any such proceeding or trial to be suspended, or a juror from time to time to be withdrawn, and the trial postponed until the testimony or such paper or writing shall be obtained.²

IX. BURGLARY.

Burglary at common law may be defined to be the crime of breaking and entering into a dwelling-house or a building immediately connected therewith, in the night, with intent to commit a felony, whether such felonious intent be executed or not, or the breaking out of a dwelling-house in the night time, after having entered it with intent to commit felony, or after committing a felony, while in the house.³

The definition of a burglar as given us by Lord COKE, is: "He that by night breaketh and entereth into a mansion-house with intent to commit a felony."⁴

BLACKSTONE says that in this definition there are four things to be considered: the time, the place, the manner and the intent.⁵

Our statutes have so far modified the rule of the common law as to establish three grades or degrees of the offence, and to include offences committed in the day time as well as by night time. It may be committed in other buildings than dwelling-houses, or in the language of the common law, a mansion or mansion-house,

¹ 2 R. S., 683, § 15.

² 2 R. S., 683, § 15; Laws 1853, ch. 539, § 2.

³ Bur. Law Dict., tit. Burg.

⁴ 3 Inst., 63.

⁵ 4 Com., 224.

aid by one, who being lawfully in a dwelling-house, breaks an inner door; yet, notwithstanding the differences between burglary as understood by the common law, and the definition of the various offences as established by our statute, the former decisions at common law are important in many respects, as being necessary to understand what is meant by the dwelling-house of another, when the night commences and ends, what is meant by curtilage, by breaking and entering, and many other terms, used both by statute and the common law.

Burglary has always been looked upon as a very heinous offence, not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion which, in such a state, would be sure to be punished with death, unless the assailant was the stronger.¹

In our State, the crime of burglary, being by statute divided into three degrees, the offence will be taken up and discussed under its several grades.

(a) *Burglary in the First Degree.*

Every person who shall be convicted of breaking into and entering in the night time, the dwelling-house of another, in which there shall be at the time some human being, with intent to commit some crime therein, either:

1. By forcibly bursting or breaking the wall or an outer door, window or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter; or,

2. By breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present aiding or assisting; or,

3. By unlocking an outer door, by means of false keys, or by picking the lock thereof, shall be deemed guilty of burglary in the first degree.²

In discussing the subject of burglary in the first degree, we shall treat of it under the following heads, viz., the manner of committing the offence, which includes the breaking and entering,

¹ 4 Black. Com., 223.

² 2 R. S., 668, § 10.

what is meant by the terms night time and dwelling-house, and the intention of committing a crime.

(b) *The Manner of Committing the Offence.*

There must be both a breaking and entry to complete the offence of burglary.¹ But they need not both be done at once, for if a hall be broken one night and the same breakers enter the next night through the same, they are burglars.²

Although both breaking and entry are necessary to constitute burglary, yet, in discussing the manner of committing the offence, it will be found more convenient to examine each subject separately, and we shall, therefore, consider first the question of the breaking requisite to constitute the crime.

(c) *Of the Breaking.*

The word break is one of familiar use and meaning; it means to separate by violence the parts of any particular substance or thing. To break a house, therefore, would in common parlance be to break, by violence, any part of it. This definition was at an early period of the history of the law upon the subject laid aside, and a breaking was adjudged to be any violation of that mode of security which the occupier had adopted.³

The breaking may be actual or constructive. By actual breaking is meant that in effecting which, more or less actual force is employed. A breaking by construction of law is where an entrance is effected by threats, frauds or conspiracy.⁴

1st. *As to the actual breaking.*—BLACKSTONE says there must in general be an actual breaking, not a mere legal *clausam fregit* (by leaping over invisible ideal boundaries which may constitute a civil trespass), but a substantial and forcible irruption, as at least by breaking and taking out the glass of or otherwise opening a window, picking a lock or opening it with a key, nay, by the lifting up of a latch of a door or unloosening any other fastening which the owner has provided.⁵

Sir WILLIAM RUSSELL says an actual breaking of the house

¹ 4 Black. Com., 226; 1 Russ. on Cr., 786.

² 4 Black. Com., 226; 1 Hale P. C., 104.

³ State v. Wilson, Cox, 439; 2 Arch. Cr. Pr., 268, note.

⁴ 1 Russ. on Cr., 786.

⁵ 4 Black. Com., 226.

may be by breaking a hole in the wall, by forcing open the door, by putting back, picking or opening a lock with a false key, by breaking the window, by taking a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by putting back the leaf of a window with an instrument, and even the drawing or lifting up the latch when the door is not otherwise fastened, the turning the key when the door is locked on the inside, or the unloosening of any other fastening which the owner has provided, will amount to a breaking.¹

It was formerly doubted whether a thief getting into a house by creeping down a chimney could be found guilty of burglary, as the house being open in that part could not be said to have been actually broken.² But it was afterwards agreed that such entry into a house will amount to a breaking, on the ground that the house is as much closed as the nature of things will admit.³

In England it was held that getting into a chimney is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house.⁴ But an entry through a hole left in the roof of a brew house, part of a dwelling house, for the purpose of light, is not like an entry through a chimney, and was held not a sufficient breaking. The chimney is a necessary opening in every house which needs protection, but if a man choose to leave an opening in the wall or roof of his house instead of a fastened window, he must take the consequences.⁵

If a man enter into a house by a door or window which he finds open, or through a hole which he finds there before, and steals goods or draws goods out of a house through such door, window or hole, he will not be guilty of burglary,⁶ for BLACKSTONE says, if a person leaves his doors or windows open it is his own folly and negligence, and if a man enters therein it is no burglary.⁷

Raising a window which is shut down close but not fastened is

¹ 1 Russ. on Cr., 787.

² 1 Hale, 552.

³ 2 East. P. C., 485; 1 Hawk. P. C., ch. 38, § 6.

⁴ Russ. & Ry., 450.

⁵ Rex v. Spriggs, 1 M. & Rob., 357.

⁶ 1 Hawk. P. C., 38, § 4; 1 Halc. 551; 3 Inst., 64.

⁷ 4 Black. Com., 226.

a breaking, although there be a hasp which could have been fastened to keep the window down.¹

Where a window opening upon hinges is fastened by a wedge so that pushing against it will open it, if such window be forced open by pushing against it there will be a sufficient breaking.²

Pulling down the sash of a window is a breaking, though it has no fastening, and is only kept in its place by a pulley weight, and it makes no difference that there is an outer shutter which is not closed.³

Where a window was left partly open, but not sufficiently so as to admit a person, the raising it higher, so as to admit a person, was held not to be a breaking.⁴

Lifting up the flap of a cellar which was kept down by its own weight is a sufficient breaking, although such flap may have been occasionally fastened by nails, and was not so fastened at the time the entry was made.⁵

When the window of a dwelling-house was covered with a netting of double twine, nailed to the sides, top and bottom, it was held that cutting and tearing down the netting, and entering the house through the window was a sufficient breaking and entry to constitute burglary.⁶

The breaking open of a chest or a box by a thief, who has entered by an open door or window, is not a kind of breaking which will constitute burglary, because such articles are no part of the house.⁷

In *Foster*, 108, the judges were divided upon the question, whether breaking open the door of a cupboard, when affixed to the freehold, was burglary or not. Lord *HALE* (1 *Hale*, 527) says such breaking is not burglary at common law. Mr. *FOSTER* (*Foster*, 109) says, upon this subject in capital cases, "I am of the opinion that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils and adapted to the same use.

¹ *Rex v. Hyams*, 7 C. & P., 441.

² *Rex v. Hall*, Russ. & Ry., 355.

³ *Rex v. Haines*, Russ. & Ry., 451.

⁴ *Rex v. Smith*, R. & M., C. C. R., 178.

⁵ *Rex v. Russell*, R. & M., C. C. R., 377.

⁶ *Com. v. Stephenson*, 8 Pick., 354.

⁷ 1 *Hale*, 523-555; 2 *East*, P. C., 488.

Where a pane of glass had been cut for a month, but there was no opening whatever, as every portion of the glass remained in its place, and the prisoner was both seen and heard to put his hand through the glass, this was held a sufficient breaking.¹

Where an aperture was closed by folding doors with hinges, which fell over it and remained closed by its own weight, but without any interior fastening, so that persons on the outside could push them open at pleasure by a moderate exertion of strength, the pushing open of such folding doors, with the intention of stealing flour, was held a sufficient breaking.² In this State removing a stick of wood from an inner cellar-door and turning a button, by which the door was fastened, in the night, with felonious intent, was held a sufficient breaking of a house to constitute burglary, though the outer cellar-door may not have been fastened.³

In *People v. Edwards and Brown* (1 Wheeler Cr. Cases, 371), it was held that the raising of the window sash, where the jury were of opinion that it was not raised when the family went to bed, was a sufficient breaking.

In the *People v. Bush* (King's General Term, 1857), neither the hall nor the door of the room, in which the defendant had been discovered, was locked; if these doors were shut he simply unlatched them when he made his entrance. The prisoner was convicted of burglary in the second degree. STRONG, J., in delivering the opinion of the court, said, "It is well settled that unlatching a door which is only latched is a sufficient burglary at the common law." The rule has been recognized by the Supreme Court of this State. I think, however, that the court erred in instructing the jury that this was a case of burglary in the second degree. Probably it was supposed to be included in that section of the statute which provides that "Every person who shall be convicted of breaking into any dwelling-house in the day time, under such circumstances as would have constituted burglary in the first degree if committed in the night time, shall be deemed guilty of burglary in the second degree." To constitute burglary in the first degree there must be forcibly bursting or breaking the wall or an outer door, window or shut-

¹ Reg v. Bird, 9 C. & P., 44.

² 2 East. P. C., 487.

³ Smith's Cases; 4 City H. Rec., 62.

ter of a window, or the lock or bolt of such door, or the fastenings of such window or shutter, or breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates then actually present, or by unlocking an outer door by means of false keys, or by picking the lock thereof. In this case there was neither. The forcibly bursting or breaking an outer door means, in common parlance, more than simply lifting a latch. That the first subdivision of the tenth section must have designated something further is apparent from the third subdivision, which provides that unlocking an outer door by means of false keys, or picking the lock thereof, shall be a sufficient breaking to constitute burglary in the first degree. The provision would have been wholly unnecessary if simply unlatching the door would have been deemed bursting or breaking it within the meaning of a former part of the same section. Clearly there is no other statutory definition of burglary in the second degree which comprehends the crime perpetrated by the defendant, as proved on his trial.

2d. Of the breaking by construction of law.—A constructive breaking is where the burglar obtains an entrance by some trick or artifice, or when the entrance is obtained by threats, fraud or conspiracy.¹

Constructive breaking, as distinguished from actual breaking, may be classed under the following heads:

1st. Where entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened.

2d. Where, in consequence of violence commenced or threatened in order to obtain entrance, the owner, with a view more effectually to prevent it, opens the door and sallies out and the felon enters.

3d. Where entrance is obtained by procuring the servants or some inmate to remove the fastening.

4th. Where some process of law is fraudulently resorted to for the purpose of obtaining an entrance.

5th. When some trick is resorted to, to induce the owner to remove the fastening and open the door, and the felon enters; as if one knock at the door under pretence of business, or counterfeit the voice of a friend, and the door being opened enter.

¹ 2 Arch. Cr. Pr., 269; 1 Russ. on Cr., 792.

In all these cases, although there is no actual breaking, there is a breaking in law, or by construction, for the law will not endure to have its justice defrauded by such evasions. In all other cases where no fraud or conspiracy is made use of or violence commenced or threatened in order to obtain an entrance, there must be an actual breach of some part of the house.¹

Where, in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence or in order to repel it, opens the door and the thief enters, such entry will amount to a breaking in law.²

The reason given at common law was that the opening of the door by the owner being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands.³

But if upon a bare assault upon a house the owner fling out his money to the thieves, it will not be burglary, though if the money were taken up in the owner's presence it is admitted that it would be robbery.⁴

The breaking may be by conspiracy thus : Where a servant conspired with a thief to let him into his master's house to commit a robbery, and in consequence of such agreement opened the door or window, in the night time, and let him in, this was considered to be burglary in both the thief and the servant.⁵

A servant in the night time opened the street door and let in the other prisoner, then showed him the side board, from whence the other prisoner took the plate ; he then opened the door and let the prisoner out, but did not go with him, but went to bed. Both the prisoners were found guilty of burglary and executed.⁶

Where an act is done *in fraudem legis* the law gives no benefit thereof to the party. Thus, if thieves having an intent to rob, raise a hue and cry and bring a constable, to whom the owner opens the door, and then when they come in, bind the constable and rob the owner, it is burglary.⁷

¹ 2 East., 484, 489 ; 2 Arch. Cr. Pr., 275, notes.

² 1 Hale, 553 ; 2 East. P. C., 486.

³ 1 Hawk. P. C., 38, § 7.

⁴ 1 Hawk. P. C., 38, § 3 ; 2 East. P. C., 486 ; Sum., 81.

⁵ 1 Hale, 553 ; 4 Black. Com., 227 ; 1 Hawk. P. C., ch. 38, § 14.

⁶ Cornwal's case, 2 Str., 881 ; 1 Hawk. P. C., ch. 38, § 14.

⁷ Sum., 81 ; Kel., 44-82 ; 3 Inst., 64 ; 1 Hale, 552 ; 4 Black. Com., 226.

So the going to a house under pretence of having a search warrant, or of being authorized to make a distress, and by these means obtaining an admittance, is a sufficient breaking and entering.¹

So the getting possession of a dwelling house by a judgment against the casual ejector, obtained by false affidavits, without any color of title, and then rifling the house, was held to be within the statute against breaking the house and stealing the goods therein.²

Fraud carried on under pretence of business will amount to a breaking in construction of law. Thus, where persons took lodging in a house, and afterwards at night, when the people were at prayers, robbed them, it was considered that the entrance into the house being gained by fraud, with an attempt to rob, the offence was burglary.³

Also, where thieves came to a house in the night-time with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and being by such means let in, robbed him, they were guilty of burglary.⁴

Where the prisoner knew that the family were in the country, and having met a boy who had the key to the house, desired him to go with her to the house, and by way of inducement promised him a pot of ale, the boy having opened the door and let her in, she sent him for the ale, and when he was gone robbed the house and went away, it was held that the prisoner was clearly guilty of burglary.⁵

It has been said there are many cases of constructive breaking which do not seem to come under the statutory definition of burglary in the first degree, to constitute which offence actual force is necessary.⁶

Yet under the second subdivision, where the party is armed with some dangerous weapon, or the breaking is done with the assistance and aid of one or more confederates, then actually present aiding and assisting, it would seem that a breaking by con-

¹ Gascoigne's case, 1 Leach, 284.

² Farr's case, Kel., 43.

³ Case of Cressy and Colter, Kel., 62; 1 Hawk. P. C., ch. 38, § 9; 1 Leach, 424.

⁴ 1 Hawk. P. C., ch. 38, § 8; LeMott's case, Kel., 42.

⁵ 1 East. P. C., 485; Rex v. Hawkins, O. B., 1704.

⁶ Barbour's Cr. Law, 2d ed., p. 98.

struction of law is as effectual as if actual force were used in committing the offence.

(d) *Of the Entry necessary to constitute Burglary.*

With respect to the entering necessary to constitute burglary, it is agreed that the least entry, either with the whole or any part of the body, hand or foot, or with any instrument or weapon introduced for the purpose of committing the felony, will be sufficient.¹

The entry need not be done at the same time with the breaking; for if thieves break a hole in a house in one night, with intent to enter another night, and come accordingly another night and commit a felony through the hole they made before, this is sufficient.²

If a thief break a window of a house with intent to steal, and put in a hook or other engine to reach out the goods, or put a pistol in the window with intent to kill, this is sufficient entry, though his hand be not within the window.³

Where the prisoner cut a hole in the window shutter, and put his hand through the hole and took out watches and other things within the building in his reach, it was held a sufficient entry.⁴

Where a thief, perceiving persons in the entry ready to intercept him, put his pistol within the door over the threshold, and shot in such a manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged burglary.⁵

It has been laid down that to discharge a loaded gun from without, into a house, is an entry.⁶

A glass sash window was left closed down, but was thrown up by the prisoners, the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, which were about an inch thick after the sash was thrown up; a crowbar had been introduced to force the shutters, and been not only within the sash, but had reached to the inside of the shutters,

¹ 1 Russ. on Cr., 794.

² 1 Hale, 551; 4 Black. Com.; Russ. & Ry., 407.

³ Sum., 80; 1 Hale, 555; 3 Inst., 64.

⁴ 2 Hale, 354.

⁵ 1 Hale, 553; 2 East. P. C., 490.

⁶ 1 Hawk. P. C., ch. 38, § 11.

as the mark of it was found on the inside of the shutters. Upon a case reserved, the judges held that this was not an entry, as it did not appear that any part of the prisoner's hand was within the window.¹

Where a glass window was broken and the window opened with the hand, but the shutters in the inside were not broken, it was ruled to be burglary, but was considered as going to the extremity of the law.²

In a later case, it was decided that introducing the hand between the glass of an outer window and an inner shutter, is a sufficient entry to constitute burglary, on the ground that, as the glass of a window is the outer fence, whatever is within the glass is within the house.³

Where a hole had been bored with a centre-bit, through the panel of a house door, near to one of the bolts, by which it was fastened, and some pieces of the broken panel were found inside of the threshold of the door, but it did not appear that any instrument, except the point of the centre-bit, or that any part of the bodies of the prisoners had been inside of the house, or that the aperture made was large enough to admit a man's hand, the court held this not to be a sufficient entry.⁴

If a man of full age take a child of seven or eight years old, and the child goes in the window and takes the goods out, and gives them to the man, who carries them away, this is burglary in the man, though the child who made the entry be not guilty by reason of his infancy.⁵

In this State, the prisoner entered in the night through a chimney into a store in the lower story of a building, which, in the second story, and above the store, contained a room inhabited as a dwelling, it was held burglary.⁶

(e) *Of the Time.*

At the common law it was necessary that the breaking and entering should have been committed in the night time, and under that requisite of the offence, the English courts have been called

¹ Rex v. Rust, R. & M. C. C., 138.

² 1 Hale, 555.

³ Russ & Ry., 341; 1 C. & P., 300.

⁴ 1 Hawk. P. C., ch. 38, § 12; 2 East. P. C., 491; 1 Leach, 406.

⁵ 1 Hale, 556.

⁶ Robinson's Case, 4 City H. Rec., 63.

upon to decide what is meant by the term night time. It is yet necessary, by our statutes, in order to constitute some of the degrees of burglary, that the offence should have been perpetrated in the night time.

In olden times the night was considered to begin with the setting, and end with the rising of the sun; but the duration established by the common law, was that those portions of the morning and evening in which, while the sun is below the horizon, sufficient of his light is above for the features of a man to be reasonably discerned, belong to the day.¹

BLACKSTONE says that this rule does not extend to moonlight, for then many midnight burglaries would go unpunished; and besides, the malignity of the offence does not so properly arise from its being done in the dark as at the dead of night, when all creation, except beasts of prey are at rest, when sleep has disarmed the owner, and rendered his castle defenceless.²

The law recognizes no middle space between day and night, but where one begins the other ends.³

The breaking and entering need not both be done in the same night. The prisoner broke the glass of the prosecutor's side door on Friday night, with intent to enter at a future time, and actually entered on Sunday night, and upon a case reserved, the judges held this to be burglary, the breaking and entering being both by night, and the breaking being with the intent afterwards to enter.⁴

It is said, however, that if the breaking be in the day time, and the entering in the night, or the breaking in the night and entering in the day, it will not be burglary.⁵

(f) *What is meant by dwelling house.*

At the common law every house for the dwelling and habitation of man was taken to be a mansion house or dwelling house, in which burglary may be committed.⁶

Our Revised Statutes provide that no building shall be deemed a dwelling house or any part of a dwelling house, within the

¹ 1 Hale P. C., 550; 2 East. P. C., 130; 3 Inst., 63; 1 Car. & P., 297.

² 4 Black. Com., 224; 1 Hale P. C., 551.

³ Rex v. Tandy, 1 Car. & P., 297.

⁴ Rex v. Smith, East. 7, 1820; Russ. & Ry., 417

⁵ 1 Hale, 551.

⁶ 3 Inst., 64.

meaning of the statutory provisions concerning burglary, unless the same be joined to, immediately connected with and part of a dwelling house.¹

The following are some of the decisions at common law as to what is meant by the term dwelling house :

A loft situated over a coach house and stables in a public mews and converted into lodging rooms, has been held to be a dwelling house, they being to all intents and purposes the habitation and domicile of the prosecutor and his family.²

A set of chambers in an inn or court were to all purposes considered as distinct dwelling houses, being often held under distinct titles, and in their nature and manner of occupation as unconnected with each other as if they were under separate roofs.³

A permanent building of mud and brick on the down at Wegg-hill was only used as a booth for the purposes of the fair for a few days in the year ; it had wooden doors and windows, bolted inside, and the prosecutor rented it for the week of the fair, and he and his wife slept there every week of the fair, during one night of which the offence was committed. It was held that this was a sufficient dwelling house for the purposes of burglary.⁴

It was also held that an inclosed ground, booth or tent erected in a market or fair, and not a permanent edifice, though the owner might lodge therein, was not a dwelling house in which burglary could be committed, and that the lodging of the owner in so frail a tenement no more made it burglary to break it open than it would be to uncover a tilted wagon in the same circumstances.⁵

A portion of the building may come under the description; thus, when the prosecutor rented only certain rooms in the house, namely, a shop and parlor, in which the burglary was committed, but that the owner did not inhabit any part of the house and only occupied the cellar, it was held that the shop and parlor were to be considered the mansion house of the prosecutor.⁶

Where the prisoner broke open a box used as a shutter box, which partly projected from the wall of the house and adjoined

¹ 2 R. S., 669, § 16.

² Rex v. Smith, 1 M. & Rob., 256.

³ 4 Black. Com., 225 ; 1 Hawk. P. C., ch. 38, § 18 ; 1 Hale, 522, 556.

⁴ Rex v. Smith, 1 M. & Rob., 256.

⁵ Black. Com., 226 ; 1 Hale, 557 ; 1 Hawk. P. C., ch. 18, § 35.

⁶ 2 East. P. C., 506 ; 1 Leach, 89, 428.

one side of the window of the shop, which side of the window was protected by wooden panelling lined with plates of iron, it was held that the shutter box was no part of the dwelling house.¹

So an area gate opening into the area only was held to be not such part of the dwelling house that the breaking of the gate would not be burglary if there be any door or fastening to prevent persons in the area from entering the house, though such door or other fastening may not be secured at the time.²

A shop built at the same time with the dwelling house, under the same roof, occupied by the same person, nearly surrounded by rooms occupied by his family, and the whole separated from the street by a common enclosure, was held in this State to constitute part of the dwelling house.³

In this State the prisoner broke into a store from which there was a communication into a room occupied for sleeping by clerks, who were members of the family of the owner of the store. Held, burglary.⁴

A part of a house may be so severed from the rest, as no longer to be a place in which burglary at common law could be committed. Thus, where a shop was part of a dwelling-house to which it was attached, and the owner of the dwelling-house let the shop to a tenant, who occupied it by means of a different entrance from that belonging to the dwelling-house, and carried on his business in it, but never slept there, there being no internal communication with the other part of the house, it was held not to be a parcel of the dwelling-house of the owner who occupied the other part, being so severed by lease, nor to be the dwelling-house of the lessee, when neither her nor any of his family ever slept there.⁵

It appears to have been well settled at common law that, unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it will not have become his dwelling-house, in the proper meaning of the word, as applied to the offence of burglary.⁶

¹ 1 Russ. on Cr., 790.

² Rex v. Davis, Russ. & Ry., 322.

³ Peo. v. Snyder, 2 Park. Cr. R., 23.

⁴ Wood's case, 5 City H. Rec., 10.

⁵ 4 Black. Com., 225; 1 Hale, 557; 2 East. P. C., 507.

⁶ 1 Russ. on Cr., 803.

It was also held that where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights, till he can get a tenant, the same rule is established, and the house under such circumstances cannot be considered as the dwelling-house of the owner.¹

Where the owner of the house has never, by himself or any of his family, slept in it, though he has used it for his meals, and all the purpose of his business, it is not his dwelling-house so as to make the breaking thereof burglary.²

Where the owner of the house has once entered upon the possession and occupation of it by himself or some of his family, it will not cease to be his dwelling-house on account of any occasional or temporary absence, even though no person be left in it.³

So if A have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in the vacation the chamber be broken open, the same rule will apply.⁴ But in cases of this kind, there must be an intention on the part of the owner to return to his house, for if the owner has quitted without any intention of returning, the breaking of a house so left will not be burglary.⁵

Where the owner of a house lets out apartments in it to lodgers, but continues to inhabit some parts of the house himself, and has but one outer door common to him and his lodgers, such apartments must be considered as parcel of his dwelling-house, and it will be a necessary consequence, that if he should break open the apartments of his lodgers in the night, and steal their goods, the offence will not be burglary, on the ground that a man cannot commit a burglary by breaking open his own house.⁶

In this State, where the building in question was owned by G, and there were several apartments in the house, all of which were occupied by tenants, the outer or hall door being common to all the occupants, and of these apartments the one alleged to have been broken and entered was occupied by W, it was held that the apartment alleged to have been broken and entered was pro-

¹ 1 Russ. on Cr., 804.

² Russ & Ry., 108.

³ 3 Inst., 64; 1 Hale, 556; Fost., 77.

⁴ 1 Hale, 556; Sum., 82.

⁵ 4 Black. Com., 225; Fost., 77.

⁶ 2 East. P. C., 506.

perly laid in the indictment as the dwelling house of W.¹ For whenever a building is severed by lease into distinct habitations, each becomes the mansion or dwelling-house of the lessee thereof, and is entitled to all the privileges of an individual building.²

The dwelling house should be the house of another. Sir WILLIAM RUSSELL observes that the inquiry as to who is to be deemed the owner of the dwelling house is a subject rather of a complicated nature, but that from the cases decided it seems that the material point to be ascertained will be whether the ownership remains with the proper owner of the dwelling house and is exercised by him either by his own occupation or by that of other persons on his account, or whether the proper owner has given such an interest to other persons in the whole or in parts of the dwelling house as to constitute an ownership in such other persons.³

(g) Of the intent.

At the common law it was necessary, in order to constitute burglary, that the breaking and entering must be done with intent to commit some felony, whether such felonious intent be executed or not.⁴ And it was immaterial whether it was a felony at common law or statute.⁵

Our statutes, however, have made a distinction in respect of the intent. The breaking and entering in the manner prescribed in the first and second degrees, with intent to commit any crime, is declared burglary, but in order to constitute burglary in the third degree it is necessary that the breaking and entering of any shop, store, booth, tent, warehouse or other building, or railroad car, ship, vessel or canal boat, in which any goods, wares, merchandise or other valuable thing shall be kept for sale, use deposit, or transportation, or any building within the curtilage of a dwelling house, but not forming a part thereof, should be with intent to steal therein or to commit some felony.⁶

In general the intent may be presumed from what the offender actually does after the breaking and entering. If he commits a

¹ *Peo. v. Bush*, 3 Park., Cr. R., 552.

² *Mason v. Peo.*, 26 N. Y., 200.

³ 1 Russ. on Cr., 807.

⁴ 1 Russ. on Cr., 785-822.

⁵ 1 Hawk., ch. 38, § 38.

⁶ 2 R. S., 668-669.

felony it may be fairly presumed that he entered for that purpose. Even the very fact of breaking and entering in the night time raises a presumption that it is done with the intention of stealing. Where a man in the night time had entered a house by the chimney, and was found in it just above the mantel piece, and when he found he was detected he ascended the chimney piece again and got out at the roof, the jury found him guilty of burglary, with intent to steal, upon this evidence alone, and the judges confirmed the conviction.¹

BLACKSTONE says it is the same whether such intention be actually carried into execution or only demonstrated by some attempt or overt act, of which the jury is to judge.²

The definition of burglary at the English common law, comprising as one of its essential characteristics the intention of committing a felony, and our statutes relating to the first and second degree having drawn the broad distinction that the intention may be to commit a crime, thus including misdemeanors as well as felonies, both by statute and at common law, much of the learning discussed by the English judges as to whether the intent was felonious or not, is applicable in this State only to cases where the charge is for burglary in the third degree under our statutes, where the intent is by statute declared to be to steal or commit some felony. The term crime, when used in our statutes, should be construed to mean any offence for which any criminal punishment may by law be inflicted.³

In Massachusetts it has been held that the mere intent to commit larceny is sufficient to constitute burglary, and a further allegation of an actual larceny is only to be taken in aid of the charge of the intent.⁴

It was said in this State that the offence is complete by the breaking and entering, with intent to steal, etc. The actual larceny, although when it can be proved, is the most conclusive evidence that the intent of the breaking and entering was to steal, need not be charged in the indictment, and when charged the proof of it is not necessarily the only proof of the intent. But there must be proof of some fact or circumstance, act or declara-

¹ 2 Arch. Cr. Pr., 309; *Rex v. Brice*, Russ. & Ry., 450.

² 4 Black. Com., 227.

³ 2 R. S., 702, § 43.

⁴ *Com. v. Williams*, 2 Cush., 582.

tion of the prisoner, in addition to the proof of the mere breaking and entering, from which the jury can find the intent charged in the indictment. The intent is to be gathered from the circumstances of the case, but the prosecution is bound to prove it affirmatively ; that is, prove facts and circumstances affirmatively, from which the jury could gather the intent, and the intent charged in the indictment.¹

(h) *Burglary in the Second Degree.*

Every person who shall be convicted of breaking into any dwelling-house in the day time, under such circumstances as would have constituted the crime of burglary in the first degree if committed in the night time, shall be deemed guilty of burglary in the second degree.²

Every person who shall be convicted of breaking into any dwelling-house in the night time, with intent to commit a crime, but under such circumstances as shall not constitute the offence of burglary in the first degree, shall be deemed guilty of burglary in the second degree.³

Every person who shall enter into the dwelling-house of another, by day or night, in such manner as not to constitute any burglary hereinbefore specified, with an intent to commit a crime, or being in the dwelling-house of another shall commit a crime, and shall, in the night time, break any outer door, window or shutter of a window, or any other part of such house to get out of the same, shall be adjudged guilty of burglary in the second degree.⁴

Every person, who, having entered the dwelling-house of another, in the night time, through an open door or window or other aperture not made by such person, shall break any inner door of the same house, with the intent of committing any crime, shall be adjudged guilty of burglary in the second degree.⁵

Every person, who, being admitted into any dwelling-house with the consent of the occupant thereof, or who, being lawfully in such house, shall in the night time break any inner door of

¹ *Peo. v. Marks*, 4 Park. Cr. R., 153.

² 2 R. S., 668, § 11.

³ *Id.*, § 12.

⁴ *Id.*, § 13.

⁵ *Id.*, § 14.

the same house, with the intent of committing any crime, shall be adjudged guilty of burglary in the second degree.

Under the first of the above subdivisions the question of time, the offence being committed in the day time instead of the night, is the only characteristic distinguishing it from burglary in the first degree.

Under the second subdivision, the most frequent distinguishing characteristic between burglary in the second and first degrees, is the fact whether there was or was not a human being in the dwelling house at the time of the commission of the offence.

In regard to the third subdivision, it was at one time said to be the common law that the entering into the house of another without breaking it, with an intent to commit some felony, and afterwards breaking the house in the night time to get out, was burglary; yet the doctrine was questioned by great authority,¹ and in England it was thought necessary to remove the doubt by legislative enactment. The breaking out must be from a dwelling-house. Where the prisoner entered a flouring-mill through an open window without sash, crossed a floor, went up a ladder and raised a trap-door not fastened, and stole flour, it was held not burglary, either at common law or under the Revised Statutes; it was merely a larceny. Breaking in from the outside is essential to burglary in the case of a building other than a dwelling.* The getting the head out through a skylight is a sufficient breaking out of a house to constitute burglary.³ It was held that if a person commits a felony in a house, and breaks out of it in the night time, this is a burglary, although he might have been lawfully in the house, and if a lodger has committed a larceny in the house, and in the night time even lifts a latch to get out of the house with the stolen property, this is a burglarious breaking out of the house.⁴ It has been decided in this State that it is burglary for the thief to break out of a house, into which he had entered in the night with an intent to steal, though he did not break, in entering.⁵ This grade of the offence, by the statute, may be committed in either the day or night time.

¹ 2 East. P. C., 490; 1 Hale, 554.

² *Peo. v. Fralick*, Hill & D. Supp., 63.

³ *Rex v. M. Kearney*, 1 Lead. Cr. Cases, 540.

⁴ *Reg. v. Wheeldom*, 8 C. & P., 747.

⁵ *Guche's Case*, 6 City H. Rec., 1.

The fourth and fifth subdivisions relate to the breaking of inner doors, in cases either where the offender has entered through an outer door, window or other aperture, or where he is lawfully in such house by the consent of the occupant or otherwise.

The breaking of an inner door, after the offender has entered by means of a part of the house which he has found open, was burglary at common law as it now is by statute. Thus, if A entered the house of B in the night time, the outward door being open, or by an open window, and when within the house turned the key of the chamber door or unlatched it, with intent to steal; this was burglary.¹

So, also, if a servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder, or rape, or with any other felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent.²

It was also held, that a lodger who had committed a larceny in a house, and in the night time lifted a latch to get out of the house with the stolen property, was guilty of burglariously breaking out of the house.³

It is provided by statute that the breaking out of any dwelling-house, by any person being therein, shall not be deemed such a breaking of a dwelling-house as to constitute burglary in any case other than such as are particularly specified in the statute above referred to, and that the breaking of the inner door of any house, by any person being therein, shall not be deemed such a breaking of a dwelling-house as to constitute burglary in any case other than such as are specified in said statute.⁴

(i) *Burglary in the Third Degree.*

Every person who shall be convicted of breaking and entering in the day time or night time:

1. Any building within the curtilage of a dwelling-house, but not forming a part thereof.

2. Any shop, store, booth, tent, warehouse or other building,

¹ 1 Hawk. P. C., ch. 38, § 6; 1 Hale, 553; 2 East. P. C., 488.

² 4 Black. Com., 227; 1 Hale, 554; 1 Stor., 481; Sum., 82.

³ Reg v. Wheeldon, 8 C. & P., 747.

⁴ 2 R. S., 5th ed., 669.

or any railroad car, ship, vessel or canal boat, in which any goods, merchandize, or valuable thing shall be kept for sale, use, deposit or transportation, with intent to steal therein, or to commit any felony, shall, upon conviction, be adjudged guilty of burglary in the third degree.¹

Every person who shall be convicted of breaking and entering into the dwelling-house of another in the day time, under such circumstances as would have constituted the offence of burglary in the second degree, if committed in the night time, shall be deemed guilty of burglary in the third degree.²

It is immaterial whether this offence be perpetrated in the day or night time, except so far as dwelling-houses are concerned, where the breaking and entering must be in the day time, and the doctrine of what constitutes a breaking and entering as laid down, while discussing the subject of burglary in the first degree, is equally applicable to the second and third degrees. What is meant by breaking and entering a building within the curtilage of a dwelling-house, but not forming a part thereof, will be treated of presently.

It will be noticed, upon the question of intent, that while the statutes in mentioning the first and second degrees of burglary, require that the offender should be actuated with the intent to commit some or any crime; that under the first and second subdivisions of the statute creating burglary in the third degree, the offender must be actuated with the intent of stealing or committing some felony.

At common law, it was said to be well established that it made no difference whether the offence intended were felony at common law or only created so by statute, and the reason given was that whenever a statute made any offence felony, it incidentally gives it all the properties of a felony at common law.³

In treating upon this question of felonious intent, it was held at common law, that if the intention of the entry be either laid in the indictment, or appear upon the evidence to have been only for the committing of a trespass, the offence will not be burglary. Therefore, an intention to beat a person in the house, will not be sufficient to sustain the indictment, for though killing or murder

¹ 2 R. S., 669, § 17, as amended by Laws of 1863, ch. 244.

² Idem, § 18.

³ 1 Russ on Cr., 824.

may be the consequence of beating, yet, if the primary intention were not to kill, the intention of beating would not make burglary. The entry must have been for a felonious purpose. It should, however, be observed that if a felony be actually committed, the act will be *prima facie* pregnant evidence of an intent to commit it; and it is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend to commit the principal offence. But it seems that this must be confined to cases where the offence intended is, in itself, a felony.¹

Under the common law, where the intent to commit a felony was requisite to constitute the offence, a man was indicted for burglary with intent to kill a horse, and it appeared in evidence that the prisoner broke and entered a stable belonging to a dwelling-house for the purpose of laming a horse that was kept there, in order to prevent him from running a race, and he accordingly effected his purpose by cutting the sinews of the fore leg, but the horse afterwards died of the wound. As wounding a horse was not at that time felony, the prisoner was acquitted of burglary, but he was afterward indicted for killing the horse, and convicted.²

Where also two poachers went to the house of a game-keeper, who had taken a dog from them, and, believing him to be out of the way, broke the door and entered. On an indictment for a burglary, it appeared that their intention was to rescue the dog, and not to commit a felony. VAUGHN, B., directed an acquittal.³

The word "building" does not require the structure to be entirely finished.⁴

A cellar in which are put goods for removal and sale has been held to be a warehouse.⁵

The words "storehouse" and "warehouse," in their popular acceptation, signify a building or apartment for the temporary deposit of goods.

An indictment charging the breaking into a store in which

¹ 1 Russ. on Cr., 822; 1 Hale, 561; 3 Inst., 65; Sum., 83; Kel., 47; 1 Hawk. P. C., ch. 38, § 36; 4 Black., 227; 2 East. P. C., 509-514.

² Dobb's Case, 2 E. P. C., 513.

³ Math. Dig. C. L., Burg., 48. See also 5 C. & P., 524.

⁴ Rex v. Worrall, 7 Car. & P., 516; Com. v. Squire, 1 Met., 258.

⁵ 1 Leach, 287; Rex v. Godfrey, 2 East. P. C., 642; Reg. v. Hill, 2 Moody & R., 458.

goods are kept for use, sale and deposit, is not sustained by evidence of breaking into an inner room of a building which was not a store, but a mere business office of the board of under writers, in which were kept merely furniture and articles for their business use.¹

Where the Gulf brewery was a corporation occupying a room in the basement of the court-house, which it had thus occupied for several years for storing beer, by the consent of those having the supervision of the building, and that such room was separated from other rooms in the basement by partition walls, which were kept locked, the keys remaining in the possession of the agents of the corporation. The prisoner entered the basement through an open window into a hall occupied for public purposes, and thence entered the room occupied by the Gulf brewery by breaking through the door. It was held that the room broken into was properly described as the storehouse building of the Gulf brewery; that the door which was broken was the outer door of the storehouse, and that the prisoner was guilty of burglary in the third degree.²

(j) Of breaking and entering a building within the curtilage of a dwelling house.

By the Revised Statutes, the first subdivision of the third degree of burglary provides that any person who shall be convicted of breaking and entering, in the day time or in the night time, any building within the curtilage of a dwelling house, but not forming a part thereof, with intention to steal therein or to commit any felony, shall, upon conviction, be adjudged guilty of burglary in the third degree.

The word "curtilage" is defined to be the open space situated within a common inclosure belonging to a dwelling house.³

Sir WILLIAM RUSSELL (1 Russ. on Cr., 861), in commenting upon the English statute (7 and 8 Geo. IV., ch. 29, § 14), punishing the breaking and entering of a building within the curtilage of a dwelling house, and occupied therewith, but not forming a part thereof, says: "This enactment, specifying as it does in express terms, a building within the curtilage of a dwelling

¹ Peo. v. Marks, 4 Park. Cr. R., 153.

² Peo. v. McClosky, 5 Park. Cr. R., 57.

³ Bouvier's Law Dict.

house, appears not to apply to many of those buildings and outhouses which, although not within any common enclosure or curtilage, were deemed by the old law of burglary *parcel* of the dwelling house, from their adjoining to such dwelling house and being in the same occupation. The inquiry under this provision of the statute will be simply whether the building is within the curtilage or homestall, but it may be useful to refer to some of the points formerly decided in cases of burglary in which it became material to consider whether particular buildings were parcel of a dwelling house, and the circumstance of their being situated within a common inclosure appears to have been treated as a material ingredient."

Under the English statute it was held that the offence was not committed by breaking into a centre building used for the purpose of trade, but having no internal communication with the dwelling houses which formed the wings. The Judges upon a case reserved, having held that the center building being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as a part of any dwelling house, and that it was not to be considered as under the same roof as the houses adjoining, though the roof of it had a connection with the roofs of the houses.¹

Where, upon an indictment for breaking and entering a building within the curtilage, it appeared that there was a large square inclosure at the back of a dwelling house, surrounded on all sides by a barn, cow sheds, a granary, pig styes and walls, and that within such larger inclosure there was a lesser inclosure, abutting on one side on the back of the dwelling house, and another on the pig styes, and the third and fourth sides of which were formed by a wall about four feet high, which separated it from the other part of the large inclosure, and the back door of the house entered into such lesser inclosure, and out of it there was a gate into the larger inclosure, into which there was no door immediately leading from the house, and some corn was stolen out of the granary, which was on the opposite side of the large inclosure from the house, it was held that the whole of the larger inclosure was within the curtilage, and not merely the lesser

¹ 2 Leach, 913; 2 East. P. C., 494.

inclosure immediately at the back of the house, and consequently that the granary was a building within the curtilage.¹

In a case where the prisoner had broken into a goose house which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded partly by other buildings of the homestead and partly by a wall, some of which buildings had doors opening backwards as well as doors opening into the yard, and there was a gate in one part of the wall opening upon a road, the Judges held that the goose house was part of the dwelling house.²

A door wall or other fence, forming part of the outward fence of the curtilage, and opening in no building, but into the yard only, was held not to be such a part of the dwelling-house, as that breaking thereof would constitute burglary; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house, and within the curtilage were over the gateway, and that there was a hole in the ceiling of the gateway for taking up goods into the building above.³

The prisoner broke open a store in the night time; the store was at the distance of twenty feet from the dwelling-house, and no person slept in the store; the house and store both stood on the same lot, and on the same line, fronting on the public highway; there was no fence between the house and store, nor any inclosure around them, but both of them, and the lot on which they stood were open to the street, it was held the store was not within the curtilage, as there was no fence or yard so as to bring them within one inclosure.⁴

(k) *Principals.*

The general doctrine respecting principals in the second degree, and aiders and abettors, applies to cases of burglary, and the breaking and entering by one, is made the act of all the party engaged in the transaction, and legally present when the act is committed. If A, B and C go upon a common purpose and design to commit a burglary in the house of D, and A only

¹ 1 Russ. on Cr., 861.

² Id.

³ 1 Russ on Cr., 864.

⁴ *Peo. v. Parker*, 4 John., 424.

actually break and enter the house, B stand near the door, but do not enter, and C stand at the lane's end, orchard, gate, etc., to watch, this will be burglary in them all, and they are all in law principals.¹

So, where two persons acted in concert in planning and executing a burglary, and one of them entered the house and brought out the property, while the other waited on the outside, both were held to be guilty of a breaking and entering.²

X. CAUSING INJURIES OR DEATH BY EXPLOSIONS FROM SALTPETRE OR GUNPOWDER IN NEW YORK CITY.

A special statute, applicable to New York city, provides that if any person be injured within certain limits mentioned in the act by means of any explosion, resulting from the violation by any other person or persons of the provisions of the said statute, and relating to saltpetre or gunpowder, the person or persons guilty of such violations shall, upon conviction before the court of general sessions, be punished by imprisonment in the State prison for a term not exceeding two years; but if such violation occasion the death of any person or persons, the offender shall, on conviction, be deemed guilty of manslaughter in the third degree, and punished as provided by law for that crime.³

XI. CRIME AGAINST NATURE.

The detestable and abominable crime against nature, committed with mankind or with a beast, is also a felony.⁴

This offence, otherwise known by the names of sodomy and buggery, is said to have been brought into England from Italy by the Lombards,⁵ and consists in a carnal knowledge committed against the order of nature by man with man or in the same unnatural manner with woman, or by man or woman in any manner with a beast.⁶

"Fortunately for the honor of human nature this offence is not of frequent occurrence, and it is equally fortunate for the morals of the community that prosecutions are rare. The crime is one of

¹ 1 Hale, 555.

² *Peo. v. Boujet*, 2 Park. Cr. R., 11.

³ 2 R. S., 665, § 42; Laws 1846, ch. 291, § 19.

⁴ 2 R. S., 689, § 20.

⁵ Burns' Just., tit. "Buggery."

⁶ 1 Hale, 669.

a nature so detestable and degrading that public opinion may be greatly relied upon for its suppression. When the judicial tribunals are called upon to investigate such charges they are frequently found to be the offspring of perjury, induced by malignant feelings, more detestable if possible than the crime charged upon the defendant. And it may well be doubted whether the public investigation of charges of this nature is not productive of more evil than good in their bearing upon the morals of society."¹

To constitute the offence the act must be in the part where sodomy is usually committed. The act in a child's mouth does not constitute the offence.² And it is said neither is an unnatural connection with an animal of the fowl kind sodomy, a fowl not coming under the term beast.³

What is stated in regard to the evidence and manner of proof in cases of rape ought especially to be observed upon a trial for this still more heinous offence. When strictly and impartially proved the offence well merits strict and impartial punishment; but it is from its nature so easily charged, and the negative so difficult to be proved, that the accusation ought clearly to be made out. The evidence should be plain and satisfactory in proportion as the crime is detestable.⁴

XII. CAUSING DEATH BY WRONGFUL ACT OF ENGINEERS, CONDUCTORS, ETC.

Every agent, engineer, conductor or other person in the employ of railroad companies through whose wrongful act, negligence or default the death of any person shall have been caused, is guilty of a felony.⁵

XIII. COMPOUNDING FELONIES.

The compounding of felonies is an offence at common law of dangerous tendency, highly derogatory to public example; and prosecutions are no more to be improperly suppressed by public informing officers than by common informers.⁶

¹ Lew. Cr. L., p. 572.

² Rex v. Jacobs, Russ. & Ry., 331.

³ Rex v. Mulcreaty, Hil. T., 1812, M. S.

⁴ 4 Black. Com., 215.

⁵ Laws 1847, ch. 450, p. 575, as amended by Laws of 1849, ch. 256, § 2, p. 389.

⁶ 9 Vt. R.; 5 N. H. R.; 11 Vt. R.; 2 Arch. Cr. Pr., 623, note.

The gist of the offence is the agreement not to prosecute; thus, accepting the promissory note of one guilty of larceny, as a consideration for not prosecuting the offence, amounts to a composition of felony, although the note be unpaid and the executor of the party giving it refuses to pay it upon the ground of illegal consideration.¹

Every person having a knowledge of the actual commission of any offence, punishable by death or by imprisonment in a State prison for life, who shall take any money or property of another, or any gratuity, or reward, or any engagement, or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal any such crime, or to abstain from any prosecution therefor, or to withhold any evidence thereof, shall, upon conviction, be punished by imprisonment in a State prison not exceeding five years, or in a county jail not exceeding one year; but if the offence committed be punishable by imprisonment in a State prison for any other term less than life, the punishment for compounding the same is imprisonment in a State prison not exceeding three years, or in a county jail not exceeding six months.²

A bargain made between a prosecutor and a prisoner, that if he discover the concealment of stolen property this shall not operate against him on the trial is obviously wrong, and should not be tolerated by the court.³

Any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence without leave of court is invalid.⁴

A party indicted for compounding a larceny, and agreeing to withhold evidence, cannot plead the acquittal of the person charged with the larceny in bar of his own conviction.⁵

XIV. CONCEALED WEAPONS.

Every person who uses, or attempts to use, or with intent to use against any other person knowingly, and secretly conceals on his

¹ Com. v. Pease, 16 Mass., 91.

² 2 R. S., 689, §§ 17, 18.

³ Collin's Case, 4 City H. Rec., 139.

⁴ 1 Chit. Cr. L., 4; 16 East., 301; 1 Campb., 46-55; 3 T. R., 17; 2 Esp., 643.

⁵ Peo. v. Buckland, 13 Wend., 592.

person, or with like intent willfully and furtively possesses any instrument of the kind commonly known as slung shot, billy, sand club or metal knuckles, or any dirk or dagger (not contained as a blade of a pocket knife), or sword-cane or air-gun, is guilty of a felony.¹

The having possession of any of the weapons above mentioned by any other than a public officer, willfully and secretly concealed on the person, or knowingly and furtively carried thereon, is to be deemed presumptive evidence of so concealing and possessing, or carrying the same, with the intent to use the same in violation of the above provision.²

XV. DISGUISED PERSONS COMMITTING CONSPIRACY, RIOT OR OTHER MISDEMEANOR.

Every person convicted upon any indictment for a conspiracy, or upon any indictment for a riot, or for any other misdemeanor, in which the offence shall be charged to be committed by such person while armed with a sword, dirk, fire arms or other offensive weapon, and while having his face painted, discolored or covered, or otherwise concealed, or having his person so disguised as aforesaid, is guilty of a felony.³

A violation of the above section is a felony, and the killing of a human being by persons engaged in a violation of that section, though the act be perpetrated without any design to effect death, is murder.⁴

XVI. DECOYING CHILDREN.

Every person who shall maliciously, forcibly or fraudulently lead, take, or carry away, or decoy or entice away, any child under the age of twelve years, with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is guilty of a felony.⁵

XVII. DUELING AND CHALLENGES TO FIGHT.

At the common law, it was a very high offence to challenge another, either by word or letter to fight a duel, or to be the

¹ Laws 1866, ch. 716, § 1, p. 1523.

² Id., § 2.

³ 2 R. S., 689, § 23; Laws 1845, ch. 3, § 7.

⁴ *Peo. v. Van Steenburgh*, 1 Park., 39.

⁵ 2 R. S., 665, § 36.

messenger of such a challenge, or even barely to provoke another to send a challenge or to fight, as by dispersing letters for that purpose, full of reflections and insinuating a desire to fight. And it was no excuse for a party so offending, that he had received provocation. The bare inducement to fight, though under such provocation, was in itself a very high misdemeanor, though no consequence ensued thereon against the peace.¹

The offence of dueling has been defined to be where both parties meet avowedly with an intent to murder.²

No particular form of words is essential to constitute a challenge to fight a duel, but whether a challenge to fight in single combat was intended, or whether it was the mere effusion of passion or folly, or the idle boast of a braggart, not intended at the time to lead to any result or to be understood by the other party as a challenge to fight a duel, are questions for the jury.³ And the expressing a readiness to accept a challenge does not amount to one.⁴

The provisions of our statutes in relation to dueling and sending challenges to fight a duel are as follows:

Every person who shall fight a duel with any deadly weapon, although no death ensue, upon conviction is guilty of a felony. And in addition to imprisonment in a State prison upon conviction, is also punished by being declared incapable of holding or being elected or appointed to any office, place or post of trust or emolument, civil or military, under the constitution and laws of the State.⁵

Every person who shall challenge another to fight such duel, or who shall send or deliver any written or verbal message purporting or intended to be such challenge, or who shall accept any such challenge or message, or who shall knowingly carry or deliver any such challenge or message, or shall be present at the time of fighting any duel with deadly weapons, either as second, aid or surgeon, or who shall advise or give any countenance or assistance to such duel, is also guilty of a felony.⁶

¹ 4 Black. Com., 150; *Rex v. Rice*, 3 East, 581; 3 Inst., 158; 1 Hawk. P. C., ch. 63, § 3; *Norton's Case*, 3 City H. Rec., 90.

² Id., 199; 1 Hawk. P. C., 82.

³ *Wood's case*, 3 City H. Rec. 139.

⁴ *Com. v. Tibbs*, 1 Dana, 524.

⁵ 2 R. S., 686, §§ 1-4; *Vide Laws 1817*, p. 5, § 1.

⁶ 2 R. S., 686, § 2; *Laws 1828*, p. 431, § 2.

Every person offending against either of the provisions last above mentioned is a competent witness against any other person offending in the same transaction, and may be compelled to appear and give evidence before any grand jury or in any court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.¹

If any inhabitant of this State shall leave the same for the purpose of eluding the operations of the provisions of the statute above mentioned respecting dueling or challenges to fight, with the intent of giving or receiving such challenge above prohibited, or of aiding or abetting in giving or receiving such challenge, and shall give or receive any such challenge, or shall aid and abet in giving or receiving the same without this State, he is to be deemed as guilty, and is made subject to the like punishment as if the offence had been committed within this State.²

Every offender specified in the last section may be indicted and brought to trial in any county of this State which shall be designated by the Governor for that purpose, and where, in his opinion, the evidence can be most conveniently obtained and produced.³

Every such offender may plead a former conviction or acquittal for the same offence in another State or territory, and if such plea be admitted or established it shall be a bar to any farther or other proceeding against such person for the same offence.⁴

Every inhabitant or resident of this State who shall, by previous appointment or engagement, fight a duel without the jurisdiction of this State, and in so doing shall inflict a wound upon his antagonist, or any other person, whereof the person thus injured shall die within this State, and every second engaged in such duel shall be deemed guilty of murder within this State, and may be indicted, tried and convicted in the county where such death shall happen.⁵

The statute further requires, that the Attorney General shall

¹ 2 R. S., 686, § 3.

² 2 R. B., 686, § 5; Laws 1816, p. 4, § 5.

³ Id., § 6.

⁴ Id., § 7.

⁵ 2 R. S., 657, § 6; Laws 1828, p. 431.

cause all persons who may be indicted for any offence against the laws for the prevention of duelling, to be brought to trial, and that he shall attend in person to the discharge of the duties required of him.¹

The section of the statute which declares that any person convicted of challenging another to fight a duel, etc., shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under this State has been held to be constitutional, and a conviction and a judgment of disqualification under it legal and valid.²

The law so far abhors all duelling in cold blood that the one who actually kills the other is guilty of murder.³ For whenever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased, or that he had often declined to meet him, and was prevailed upon to do it by his importunity, or that it was his intent only to vindicate his reputation, or that he meant not to kill but only to disarm his adversary. He has deliberately engaged in an act highly unlawful, in defiance of the laws, and he must, at his peril, abide the consequences.⁴

XVIII. EMBEZZLEMENT.

Embezzlement is distinguished from larceny properly so called as being committed in respect of property which is not at the time in the actual or legal possession of the owner.⁵

Embezzlement is only a species of larceny. It is in every respect a precisely similar crime to that which is committed by a servant who receives property from his master and appropriates it. This is larceny, because the possession of the master continues in law until the wrongful appropriation by the servant takes place. The case which was held not to be larceny was that of a banker's clerk who received money from a customer and appropriated it, and the reason given was, that as the employer had never had possession of the money, he had never been wrong-

¹ 1 R. S., 180, § 9.

² *Barker v. Peo.*, 6 Cow., 686; 20 John., 457; 2 Whee. Cr. Cases, 19.

³ *Reg v. Young*, 8 O. & P., 644; 1 Hawk. P. C., ch. 31, § 31; 1 Hale, 442-452.

⁴ 1 Hale, 452, 453; 1 Hawk., P. C., ch. 31, §§ 21, 22.

⁵ *Burril's Law Dict.*, vol. 1, p. 415.

fully deprived of the possession of it, which was a necessary ingredient in the crime of larceny.¹

The English act was passed in consequence of this decision, and its effect was to make the master's possession commence from the moment that his property came into the servant's hands.²

It was held that where money was received on account of his master by one servant, and by him handed to another in due course of business, and the latter appropriated it, that this was embezzlement, as the master clearly never had possession by the first servant any more than by the second.³

(a) *Statutory Definition.*

If any clerk or servant of any private person or of any co-partnership (except apprentices and persons within the age of eighteen years), or if any officer, agent, clerk or servant of any incorporated company shall embezzle or convert to his own use, or take, make way with or secrete with intent to embezzle, or convert to his own use without the assent of his master or employers, any money, goods, rights in action, or other valuable security or effects whatever belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for feloniously stealing property of the value of the articles so embezzled, taken or secreted, or of the value of any sum of money payable and due upon any right in action so embezzled.⁴

Every embezzlement of any evidence of debt negotiable by delivery only, and actually executed by the master or employer of any such clerk, agent, officer or servant, but not delivered or issued as a valid instrument, shall be deemed an offence within the meaning of the last preceding section.⁵

An indictment for an embezzlement lies against a clerk or servant for converting to his own use the money, goods, etc., of his master or employer, as well as for converting to his own use the money, goods, etc., of any other person which shall have come into his possession or under his care by virtue of his employment.

¹ R. v. Bazeley, 2 East. P. C., 576; Ros. Cr. Ev., 6th ed., 414.

² Ros. Cr. Ev., id.

³ R. v. Masters, 1 Den. C. C., 332.

⁴ 2 R. S., 678, § 61.

⁵ Id., § 62.

The words "any other person" in the statute means any other person than he who is guilty of the embezzlement.¹

Our statute is conformable to the English act. That statute was enacted for the purpose of reaching a class of cases which could not be punished as larcenies at the common law, on account of the technical subtlety that, where the offender had the qualified property and actual possession of the goods at the time they were embezzled, he could not be guilty of larceny. Thus, as we have already seen in discussing the question of larceny, if a clerk received money of a customer, and, without at all putting it in the till, converted it to his own use, he was guilty only of a breach of trust, though had he once deposited it and then taken it again he would have been guilty of larceny. So a cashier of a bank could not be guilty of larceny in embezzling an India bond, which he had received from the court of chancery and which was in his actual as well as constructive possession.²

(b) Who is to be deemed a Clerk or Servant.

A barkeeper in an inn, intrusted to carry letters to and from the post-office, who fraudulently converts to his own use a letter inclosing money, given him to carry to the post-office, is guilty of embezzlement; and to convict him it is not necessary to show that he broke open the letter, or fled after the commission of the offence, or to show the dissent of his employer; it is enough that there be a fraudulent commission, and that being shown a felonious intent is inferred.³

Where a constable was employed to collect certain demands without suit, if the debtors would pay, and by procuring and serving process before a justice of the peace if they would not, it was held that he was not a servant of the creditor within the meaning of the statute concerning embezzlement.⁴

A stage driver to whom packages of money are intrusted by his employers, to be by him carried from one place to another, is a servant, and the money comes into his possession or under his care by virtue of his employment as such servant within the meaning of the Revised Statutes.⁵

¹ *Peo. v. Hennessey*, 15 Wend., 148.

² 2 Arch. Cr. Pl., 7 ed., p. 560; 2 Leach, 831; 1 Leach, 28.

³ *Peo. v. Dalton*, 15 Wend., 581.

⁴ *Peo. v. Allen*, 5 Den., 76.

⁵ *Peo. v. Sherman*, 10 Wend., 298.

It is immaterial whether the servant be paid by certain wages, or by a percentage on the receipts, or by a share of the profits arising from his labor. Thus, where a clerk to a banking firm was to receive one-third of one of the partner's profits, being the fifteenth share of the whole profits of the house; to which the other partners assented, but they considered the prisoner not liable to them for losses, it was held that the prisoner was not a partner, and might be guilty of embezzling property received on behalf of the firm.¹

So where the prisoner was employed by the master of a coal vessel, who sent him with a cargo of coals, and the custom of the trade was for the person who superintended the business to receive two-thirds of the freight and the owner one-third, and the prisoner took the whole; whereupon he was indicted and convicted. It was objected that he and the master were joint proprietors of the freight, but a large majority of the judges held the conviction right.²

So, also, where the prisoner was employed by the prosecutors as a traveler, to take orders for goods and collect money for them from their customers, and was paid by a percentage upon the amount of the orders he obtained; he did not live with them nor act in their counting-house; he paid his own expenses on his journeys, and he was employed as a traveler by several other houses besides. The judges held that he was a clerk to the prosecutors.³

Neither is it material whether the employment be permanent or occasional. Thus, where it appeared that the prisoner had applied to the prosecutor for employment, who agreed to let him carry out parcels and go of messages when he had nothing else to do, for which the prosecutor was to pay him what he should think fit. The prosecutor gave him an order to receive the sum of two pounds for him, which he received and embezzled, the judges held him to be a servant to the prosecutor, within the meaning of the act.⁴

But it was held in this State, that a person casually employed by an individual to receive money in a single message, and pay it

¹ Holmes' Case, 2 Lewin, 256.

² Rex v. Hartley, Russ. & Ry, 139.

³ R. v. Carr, R. & Ry., 198; affirmed by R. v. Tite, 1 L. & C. C., 229.

⁴ R. v. Spencer, R. & Ry., 299.

out, is not a servant of such individual within the Revised Statutes relating to embezzlement by clerks or servants.¹

So, also, it was held in England that a prisoner cannot be convicted of embezzlement, unless he be the servant of the prosecutor at the time he receives the money, and merely sending the prisoner to the bank to get money, is not sufficient to make him the servant, though he be paid for going.²

A drover was employed by a grazier to drive oxen to market with instructions to sell what he could on the road, and deliver the rest to a salesman at S, who was to sell them for the grazier. The drover sold part on the road, and took the rest to S, and sold them there, and applied the money to his own use; it was held that he was not a servant, and could not be convicted of embezzlement.³

But where a drover was employed in a single instance to drive a cow and calf to a person to whom they were sold, and to bring back the money they were sold for, he was held to be a servant.⁴

The prisoner was a carrier whose only employment was to carry unsewed gloves from a glove manufacturer at A, to glove sewers who resided at B, to carry them back when sewed, and to receive the money for the work, and pay it to the glove sewers, deducting his charge. On several occasions, he appropriated the money which he received on behalf of the sewers. It was held that he was not the servant of the sewers, so as to be guilty of embezzlement, but that his offence was a breach of trust, being a mere bailee of the money.⁵

The prosecutors, who were manure manufacturers, engaged the prisoner who kept a refreshment house at B, to get orders, which they supplied from their stores. The prisoner was to collect the money and pay it at once to them, and send a weekly account, and was called agent for the B district. Subsequently, the prosecutors sent large quantities of manure to stores at B, which were under the control of the prisoner, who took them in his own name, and paid the rent. The prisoner supplied orders from these stores; but the first mentioned mode of supplying orders

¹ *Lewis v. Kendall*, 6 How. Pr. R., 59.

² *Rex v. Freeman*, 5 C. & P., 534.

³ *Rex v. Goodbody*, 8 C. & P., 665.

⁴ *Rex v. Hughes*, R. & M. C. C. R., 370.

⁵ *R. v. Gibbs*, Dears' C. C., 445.

was not abandoned. The prisoner received a salary of one pound per annum, besides commission. It was held that the relation was one of principal and agent, and that the prisoner was not guilty of embezzlement.¹

(c) Servants of Private Individuals, Partners and Corporations.

By the act providing for the punishment of persons guilty of embezzlement, the clerks and servants of private individuals, partners and corporations (except apprentices and persons within the age of eighteen years), are equally liable with the clerks or servants of those engaged in trade or mercantile pursuits.

Under the English statute, the collector of the poor rate, appointed by the overseers, was held a servant of the overseers;² but in this State, it was held that the relation between the keeper of a county poorhouse, and the superintendent who employs him, is of a public nature, and the former cannot be deemed the agent or servant of a private person within our statute of embezzlement. Nor is such keeper the agent or servant of an incorporated company within the same statute, though the superintendents of the poor, or the sole superintendent be a corporation, they or he are not an incorporated body; the statute, by incorporated companies, intends those only which are composed of individuals associated together for private purposes.³

Where a man is the clerk or servant of partners, he is deemed the clerk and servant of all and each of the partners, and if he receive money for the private account of any one of them, and embezzle it, he may be indicted.⁴

The clerk of a joint stock company, is the clerk and servant of the directors who appoint him, and where such clerk, having the care and custody of the checks, paid and cancelled by the company's banker, embezzled all of them, and was charged in the indictment as having embezzled a piece of paper, the property of the company, and convicted, the court held that he was properly convicted, although he himself was a shareholder in the company.⁵

¹ R. v. Walker, Dears & B. O. C., 606.

² R. v. Adey, 19 L. J., 149, m.; R. v. Collahan, 8 C. & P., 154.

³ Coates v. The Peo., 22 N. Y. Rep., 245.

⁴ R. v. Leach, 3 Stark N. P. R., 70.

⁵ R. v. Atkinson, Car. & M., 525; R. v. Watts, 19 Law. J., 192, M.

If such person was at the time in the service of a corporation, he is not to be deemed liable, within the statute, unless it is shown that, to do errands of the kind, was his employment by the corporation.¹

It is held, that if a person is employed as the servant of a corporation, he may be guilty of embezzlement, although not duly appointed, or even appointed at all, under the common seal of the corporation.²

(d) By Virtue of his Employment.

If a servant has no authority to receive any money he cannot be guilty of embezzlement, although the money is paid to him on the supposition that he has authority to receive it, and he gives a receipt for it on behalf of his master.³

Thus, when the prisoner was in the service of the prosecutor, but not authorized to receive money, and a person who owed the prosecutor five pounds paid it to the prisoner, supposing him to be a servant of the prosecutor and authorized to receive it, and the prisoner never accounted for the money, it was held not to be embezzlement on the authority of the case cited above.⁴

A servant employed to receive money of one description and at one place, employed in a particular instance to receive money of another description and at a different place, may be guilty of embezzlement in the latter instance. Thus, the lessees of two toll-bars employed the prisoner to collect the tolls at one, and in a particular instance ordered him to receive the money collected at the other, which he received accordingly and embezzled. A conviction for embezzlement was held right.⁵

But in a case precisely similar, PARKE, B., directed an acquittal, observing that he had never approved of that decision.⁶

Receiving from a customer that which in the ordinary course the servant would have received through the medium of another servant employed to collect from customers, was held to be a receipt by virtue of the employment of the servant who so imme-

¹ 10 Wend., 298; 15 Wend., 581; 4 Car. & P., 390; 7 Id., 281; 32 Eng. Com. L., 510; 6 How. Pr., 59.

² Rex v. Beacall, 1 C. & P., 457; Rex v. Willings, Idem.

³ Rex v. Thorley, R. & M. C. C. R., 343.

⁴ Rex v. Howtin, 7 C. & P., 281.

⁵ Russ, & Ry., 516.

⁶ Crow's case, 1 Lew., 88.

diately received from the customer, in a case where the servant being intrusted to receive at home from out-door collectors, received abroad from an out-door customer.¹

If the money be received contrary to the terms of the employment it is not embezzlement. Thus, where by virtue of his employment it was the duty of the prisoner to take not less than twenty shillings for covering a mare by a stallion, and he received six shillings, the whole charge made by him for covering one mare, and had not accounted for it, it was held not an embezzlement.²

The English act was held to apply to a servant who embezzled money received from a customer to whom his master had given it for the purpose of trying the servant's honesty.³

If a person duly enters in his books all sums of money that he has received, the mere fact of not paying over the money does not amount to embezzlement.⁴

Although the receipt of the money must be while the prisoner is in the service of the prosecutor, yet it seems that the embezzlement of the money may be after the prisoner has ceased to be the servant.⁵

The servant of a carrier employed to look after the goods, but not entrusted with the receipt of money, it has been held, could not be convicted of embezzling money paid him by one of his master's customers.⁶

Although it may not have been part of the servant's duty to receive money in the capacity in which he was originally hired, yet if he has been in the habit of receiving money for his master he may be convicted.⁷

(e) Apprentices and Persons Within the Age of Eighteen Years.

By the terms of the statute above cited, apprentices and persons within the age of eighteen years are excepted from the operations of the act.

¹ Russ. & Ry., 319.

² Rex v. Snowley, 4 C. & P., 390.

³ 2 Leach, 912; see Russ. & Ry., 160.

⁴ Rex v. Hodgson, 3 C. & P., 422.

⁵ Reg. v. Lovell, 2 M. & Rol., 236.

⁶ R. v. Thorley, 1 Moo. C. C., 348.

⁷ R. v. Barker, Dow. & Ry. N. P. C., 19.

(f) Embezzlement by Carriers, etc.

It will be seen, in treating upon the subject of larceny, that where carriers who had received property by virtue of a bailment, without an original felonious intention to convert the same to their own use, and who subsequently made a wrongful conversion of the property without having, as it is technically termed, broke the bulk or separated the articles from the package or box in which they were contained, a conviction for larceny could not be had, unless there had been a determination of the contract of bailment and a new asportation of the property after the bailment had been fully completed and ended. In order to provide for this class of cases, and to punish carriers and other bailees in cases where there had been no breaking of bulk, the Revised Statutes, as subsequently amended, provide as follows:

“If any carrier or other person to whom any goods, money, right in action, or any valuable personal property or effects, shall have been delivered to be transported or carried for hire, shall, without the assent of his employer, take, embezzle, or convert to his own use, or make way with, or secrete with intent to embezzle, or convert to his own use such goods, money, right in action, property, or effects, or any of them, in the mass as they were delivered, without breaking the trunk, box, pack, or other thing in which they, or any of them, shall be contained, and before delivery of such articles at the place, or to the person entitled to receive them, he shall, on conviction, be punished in the same manner as if he had taken, embezzled, converted, or secreted such goods or other personal property after breaking the trunk, box, pack, or other thing containing the same, or after separating any of them from the others. And if any carrier or other person, who shall have received any advance for the cost or price of freight upon any property received, or to be received for transportation or carriage, or who shall have received any advance for the payment of tolls, or the payment of any other public or private charge upon the right of transit, shall, without the assent of the person making such advance, convert or apply the said advance to his own use, or to any other purpose than that for which said advance was made, or shall secrete the same, or shall refuse to apply the same to the purpose for which he received the same, shall, upon conviction thereof, be deemed guilty of embezzlement, and shall be punished in the manner prescribed

law for feloniously stealing property of the value of the advance so converted, or applied, or secreted.”¹

The separation and conversion to his own use by a carrier, without the assent of the owner, of sundry bars of pig iron, part of a larger number which had been delivered to him for transportation and loaded upon his canal boat, is larceny, and not embezzlement. Where the commodity, a part of which is separated by the carrier from the rest, is transferred in commerce by weight and not by count, the severance is a trespass which determines the privity of contract, and a breaking of bulk equivalent to the opening of a bale or package.²

NOTE.—For what is meant by “the breaking of bulk by carriers” see the section of “Larceny by bailees,” post.

(g) *Punishment.*

The punishment for embezzlement, where the property embezzled amounts in value to twenty-five dollars or upwards, is the same as that prescribed for grand larceny, and where the value of the property embezzled is less than twenty-five dollars in value, the punishment is that prescribed by statute for petit larceny. In estimating the grade of punishment, the value of any sum of money, payable and due upon any right in action embezzled, is to be deemed its value.³

XIX. ENLISTED MEN—DEFRAUDING AND DRUGGING OF.

Any recruiting agent or other person acting under authority of the State or general government or any local municipality or otherwise, who shall willfully defraud any person enlisting or having enlisted into the military or naval service of the United States of the money to which such person is entitled as pay for such enlistment, or any part of such money, is guilty of a felony; and whoever shall knowingly and willfully use or administer to any person any drug or stupefying substance, with intent, while such person is under the influence thereof, to induce such person to enter the military or naval service of the United States, or of this State, or of any other State, is also guilty of a felony.⁴

¹ Laws 1865, ch. 729.

² *Nicholls v. The Peo.*, 17 N. Y. R., 114.

³ 2 R. S., 678, § 61. Vide ante, p. 408.

⁴ Laws 1864, ch. 391, p. 889.

XX. ESCAPES FROM PRISONS AND PRISON BREACH.

An escape is where one who is arrested gains his liberty before he is delivered by the course of the law.¹

Where a party effects his own escape by force the offence is usually called prison breaking, and such breach of prison or even the conspiring to break it was felony at the common law, for whatever cause, either civil or criminal, when the party was lawfully imprisoned.²

The general principle was early said to be that all persons are bound to submit themselves to the judgment of the law and to be ready to be justified by it. Those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, are guilty of an offence in the nature of a high contempt.³

Where the liberation of the party is effected by himself or others without force, it is more properly called an escape; where it is effected by the party himself with force, it is called prison breaking, and where it is effected by others with force it is commonly called a rescue.⁴

The Revised Statutes provide for the punishment of escapes from both State and county prisons, and regulate the term of punishment according to the nature of the charge upon which the person was confined, and also according to the kind of prison from which the escape was had or attempted to be made. A portion of these offences are classed among the felonies, while the others are but misdemeanors. The statutes regulating this offence where the punishment is that of a misdemeanor will be spoken of hereafter.⁵

The following are the sections of the statute where the offence amounts to a felony :

(a) If any person confined in a State prison for any term less than for life shall break such prison and escape from thence, he shall, upon conviction, be punished by imprisonment in a State

¹ 1 Russ. on Cr., 416.

² Id., 427.

³ 4 Black. Com., 129; 2 Hawk. P. C., ch. 17, § 5.

⁴ 1 Russ. on Cr., 416; 1 Hale, 590; 2 Hawk. P. C., ch. 17, *et seq.*

⁵ Vide post.

prison, the term thereof to commence from and after the expiration of the original term of his imprisonment.¹

If any person confined in a county jail upon any conviction for a criminal offence shall break such jail and escape from thence, he shall, upon conviction, be punished by imprisonment in a State prison not exceeding two years, or in a county jail not exceeding one year, to commence from the expiration of his former sentence.²

Under the English statute it was held that the breach of the prison must be an actual breaking, and not such force and violence only as may be implied by construction of law, and if a party go out of a prison through the consent or negligence of the jailor, or if he otherwise escape without using any kind of force or violence, it was said that he was guilty of a misdemeanor only.³

But where the prisoner in getting over a wall threw down some bricks which were placed loose at the top so as to give way upon being laid hold of, the judges were unanimously of an opinion that this was a prison breach.⁴

(b) Every person lawfully imprisoned in a State prison for any term less than life who shall attempt by force and violence to any person to escape from such prison, whether such escape be effected or not, shall, upon conviction, be adjudged to imprisonment in a State prison, the term thereof to commence after the termination of the imprisonment to which such person shall have been sentenced at the time of such attempt.⁵

(c) If any prisoner confined in a county jail or in a State prison, upon a conviction for a criminal offence, shall escape therefrom, he may be pursued, retaken and imprisoned again, notwithstanding the term for which he was sentenced to be imprisoned may have expired at the time when he shall be retaken, and shall remain so imprisoned until tried for such escape, or until he be discharged on a failure to prosecute therefor.⁶

It is criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence

¹ 2 R. S., 685, § 24.

² 2 R. S., 685, § 25.

³ 1 Hale, 611; 2 Inst., 590; 1 Russ. on Cr., 429.

⁴ *Rex v. Haswell*, East. T., 1821; Russ. & Ry., 458; 1 Russ. on Cr., 429.

⁵ 2 R. S., 685, § 26.

⁶ 2 R. S., 685, § 23.

of the jailor, or if he escape in any other manner without using any kind of force or violence, he will be guilty of a misdemeanor, and if his prison be broken by others, without his procurement or consent, and he escape through the breach so made he may be indicted for the escape.¹

(d) Every person who shall convey into a State prison, jail or other place of confinement any disguise, instrument, arms, or other thing proper or useful to aid any prisoner in his escape, with intent thereby to facilitate the escape of any prisoner lawfully committed to or detained in such prison, jail or place, for any felony whatever, or on a charge for any felony, whether such escape be effected, or attempted, or not, is guilty of a felony.²

Also, every person who shall by any means whatever aid and assist any prisoner lawfully detained in a State prison, or in any jail, or place of confinement for a felony, or on a charge for any felony, to escape therefrom, whether such escape be effected or not, or who shall forcibly rescue any prisoner held in legal custody upon any criminal charge, shall, upon conviction, be punished by imprisonment in a State prison.³

But if any aid and assistance, prohibited by the last section, be rendered by any prisoner detained for any crime in the same jail or place of confinement, with the intent of facilitating his own escape, the punishment of such prisoner shall not exceed that prescribed by law, upon a conviction, for his own escape.⁴

A prisoner who attempts to escape by breaking the prison, in consequence of which a fellow prisoner confined for felony escapes, is guilty of the mischief of aiding the fellow prisoner to escape, and is punishable under the statute.⁵

Lying in wait near a jail by agreement with a prisoner and conveying him away, is not aiding a person in jail escaping, within the meaning of the statute, though a misdemeanor at common law.⁶

Neither is aiding to escape from jail a prisoner committed on suspicion of having been accessory to the breaking of the house of S, with intent to commit felony, indictable under the statute

¹ 1 Hale, 611; 2 Inst., 589, 590; Sum., 108; 1 Russ. on Cr., 416.

² 2 R. S., 684, § 16; Laws 1837, ch. 457.

³ 2 R. S., 684, § 17.

⁴ 2 R. S., 684, § 19.

⁵ *Peo. v. Rose*, 12 John., 339.

⁶ *Peo. v. Tompkins*, 9 John., 70.

which makes it an offence to aid the escape of a person detained for any felony, because the prisoner was not committed on any distinct and certain charge of felony.¹

XXI. FALSE PRETENCES AND FALSELY PERSONATING OTHERS.

At the common law, a variety of frauds and cheats were punishable, which were described to be deceitful practices in defrauding, or endeavoring to defraud another of his own right by means of some artful device, contrary to the plain rules of common honesty.²

Many of the offences thus enumerated by the older writers, include a variety of injuries, for which the redress of the party injured is, by a civil remedy, and not by criminal prosecution, as the rule now is, that at common law no mere fraud, not amounting to a felony is an indictable offence, unless it affects the public.³

Our statutes, so far as this class of cases, amount to felonies, comprise the false personating of others, and the obtaining of money and other valuable things by false pretences, and are as follows:

(A) Every person who shall falsely represent or personate another, and in such assumed character, shall:

1. Marry another, or,
2. Become bail or surety for any party in any proceeding, civil or criminal, before any court or officer authorized to take such bail or surety, or,
3. Confess any judgment, or,
4. Acknowledge the execution of any conveyance of real estate, or of any other instrument, which by law, may be recorded, or,
5. Do any other act in the course of any suit, proceeding or prosecution whereby the person so represented or personated may be made liable in any event to the payment of any debt, damages, costs or sum of money, or his rights or interest may in any manner be affected, is guilty of a felony.⁴

No indictment for the offence described in the first subdivision of the preceding section shall be found, unless upon the complaint

¹ *Peo. v. Washburn*, 10 John., 160.

² 1 Hawk., ch. 71, § 1.

³ *Peo. v. Gates*, 13 Wend., 311; *Peo. v. Stone*, 9 Id., 182; 6 Mass., 72; *Peo. v. Herrick*, 13 Wend., 87.

⁴ 2 R. S., 676, § 50.

of the injured party, and within two years after the perpetration of the offence.¹

(B) Every person who shall falsely represent or personate another, and in such assumed character, shall receive any money or other valuable property of any description, intended to be delivered to the person so personated, shall, upon conviction, be punished in the same manner, and to the same extent, as for feloniously stealing the money or property so received.²

(C) Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property or valuable thing, is guilty of a felony.

The above provision of the statute applies to every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any false pretence obtain the signature of any person to any written instrument, or obtain from any person any money, personal property or valuable thing for any alleged charitable or benevolent purpose whatever.³

The general rules in relation to what is necessary in order to constitute the crime of obtaining money or goods by false pretences, under the statutes, as gathered from an examination of the authorities, may be stated as follows:

1. That the defendant made the representations charged in the indictment.

2. That the representations were false, and known by the defendant to be false when made.

3. That at the time they were made by the defendant, it was his intention to defraud the prosecutor, and that they did work him an injury.

4. That they were relied upon by the prosecutor as true, and that they had a material, substantial influence upon him, and in inducing him to part with his money or property.

5. That they were of such a character as would naturally deceive a man of ordinary care, caution and prudence, and such as common prudence and caution could not well guard against.

¹ 2 R. S., 676, § 51.

² 2 R. S., 676, § 52.

³ 2 R. S., 677, § 55; Laws 1851, ch, 144.

(a) In order to constitute false pretences there must be an express allegation which is false, not a mere act calculated to deceive.¹ Thus, where the defendant stated that he was a grocer and resided at a particular place, it was held a false pretence under the statute, and not a mere naked falsehood.²

Also a false statement by a buyer of goods that he was solvent, had never had a note protested, etc., on the faith of which the seller was induced to make the sale, was held within the statute.³

And falsely pretending that sheep offered for sale to the prosecutor were free from disease and foot ail, and that their apparent lameness was owing to an accident, by means of which false representations a sale was effected and money obtained by the defendant, was held as coming within the statute.⁴

So also a person who obtains goods under the pretence that he lives with and is employed by another person who sent him for them, is indictable for obtaining goods by false pretences under the statute.⁵

Under the English statute it was held that the false pretences need not be in words, for the conduct and acts of the party will be sufficient without any verbal assertion. Thus, where a man assumed the name of another to whom money was required to be paid by a genuine instrument; also where a person at Oxford who was not a member of the university, went for the purpose of fraud, wearing a commoner's cap and gown, and obtained goods, it was held within the act, though not a word passed. These cases would more appropriately fall within our statute in relation to the false personating of others.⁶

But it was said in this State that as a general rule there must be false representation by words, written or spoken, to constitute a false pretence, that is, words used by the offender himself, or used by another and assented to by him; that it was not believed

¹ Allen's case, 3 City H. Rec., 118; Conger's case, 1 Whee. Cr. Cas., 448.

² Peo. v. Dalton, 2 Whee., 161; Smith's case, 5 City H. Rec., 180.

³ Peo. v. Haynes, 11 Wend., 557; reversed on other grounds, 14 id., 547; Robinson v. Dauchy, 3 Barb., 20; Conger's case, 4 City H. Rec., 65; 1 Whee. C. C., 448.

⁴ Peo. v. Crissie, 4 Den., 525. See 3 T. R., 98; 19 Pick., 179.

⁵ Peo. v. Johnson, 12 John., 292; 1 City H. Rec., 116.

⁶ Whar. Cr. L., 5th ed., 2113; R. v. Story, R. & B., 81; R. v. Barnard, Id.; Com. v. Daniel, 2 Par., 332.

that a mere false show or appearance, however specious or successful it might be, would support a prosecution under this statute, as if a person, to give himself false credit, and with an intent to deceive, should fill his store with empty bales and boxes, and thereby make it be believed that he was doing a great business, or if he should go to a counter with a purse of good or bad guineas, or with genuine or counterfeit bank notes, and obtain goods by inducing a belief by such show that he intends to be a cash customer. The court did not think that one, by exhibiting those false appearances, would subject himself to a criminal prosecution any more than if he obtained a false credit by living in a style beyond his means, or any more than if he should, without ever intending to pay for it, obtain credit for a pound of tea by going to a grocery in a coach and six.¹

(b) The false pretence must relate to an existing fact. Any representation as to what will or will not happen cannot be considered as a false pretence. This makes the distinction between a false representation and a false pretence.²

So if a man obtain goods by promising to pay cash for them, or to pay for them at a future time, or gives his note for them, with assurances that it shall be paid at its maturity, when at the same time he does not intend to pay: these are false promises only, because there is no pretence that any fact exists. There is no representation as to what is then presently untrue.³

And it was subsequently held by the Court of Appeals that the obtaining money by false and fraudulent assurances by the accused, that he can and will give the other party employment, and will pay him a stated salary, by which such party is induced to deposit money as security for faithful performance, is not indictable under the statute of false pretences. The false representation is essentially promissory in its nature, and this has never been held the foundation of a criminal charge.⁴

(c) To constitute the offence, there must be an intent to cheat or defraud, and the fraud must be accomplished by means of some false pretence designedly used, or, if not wholly by that means, it must have had so material an effect upon the mind of

¹ *Peo. v. Conger*, 1 Whee., Cr. Cas., 459.

² *Peo. v. Conger*, 1 Whee. Cr. Cas., 457; *Peo. v. Tompkins*, 4 Park. 224.

³ *Id.*

⁴ *Ranney v. People*, 22 N. Y., 413.

the party defrauded that without it he would not have parted with the money or property, or signed the written instrument.¹ But it is not necessary that the false pretence should have been the sole inducement with the aggrieved party for parting with his property. It is enough that it was a controlling one—one without which he would have refused.²

The general rule is stated to be that it must be alleged in the indictment, and must appear on the trial that credit was given to the false pretence, and that by it the person was induced to part with his property. If credit was given independently of the false pretence, or if the property was obtained by any other inducement, then the indictment cannot be supported.³

Where goods were boxed, marked and shipped, after which the seller found reason to doubt the solvency of the purchaser, and expressed his intention to stop them in transitu, and the purchaser, by means of false representations as to his ability to pay, induced him to forego this intention, it was held not a case of obtaining goods under false pretences, because the delivery was complete in law, and the goods had become the property of the purchaser before the false representations were made.⁴

(d) A false pretence must not only be a misrepresentation as to an existing fact, but it must be a willful misrepresentation, or, in other words, the party must know that he is making a false representation. This is not only implied by the word "pretence" itself, but is shown by other words connected with it in the statute. The charge in the indictment must be that the money, goods or effects were knowingly and designedly obtained by the pretences. Without these allegations the indictment would be bad, and if a defendant, on his trial, can show that what is imputed to him as a false pretence was a misrepresentation made through mistake or misinformation, he would undoubtedly be exonerated.⁵

(e) A representation though false is not within the statute against obtaining property by false pretences, unless calculated

¹ *Peo. v. Crissie*, 4 Den., 525.

² *Peo. v. Haynes*, 11 Wend., 557; *Peo. v. Herrick*, 13 Id., 87. See 1 City H. Rec., 140.

³ *Peo. v. Conger*, 1 Whee. Cr. Cas., 467; 2 East. Cr. L., p. 831; 1 City H. Rec., 140.

⁴ *Peo. v. Hayes*, 14 Wend., 547, reversing 11 Id., 557.

⁵ *Peo. v. Conger*, 1 Whee. Cr. Cases, 461.

to mislead persons of ordinary prudence and caution.¹ For it is a well settled and rational rule that false pretences, in order to sustain an indictment, must be such that if true they would naturally, and according to the usual operation of motives upon the minds of persons of ordinary prudence, produce the alleged results, or, in other words, that the act done by the person defrauded must be such as the apparent exigency of the case would directly induce an honest and ordinarily prudent person to do if the pretences were true.²

Thus, exhibiting to a person a forged warrant against him for a criminal offence, and pretending it to be true, and offering to settle it, and obtaining property from him in settlement, is not within the statute; such pretence, even if believed to be true, could not lawfully or in common prudence lead the party to make such a settlement.³

In another case, the judge, who delivered the opinion, said: "Though the language of the statute, 'by any other false pretence,' is exceedingly broad, and its general acceptation would include every kind of false pretence, and though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection; still, I do not think it should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand." The object of the statute, it is true, was to protect the weak and credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which would require the representation to be an artfully contrived story, which would naturally have an effect upon the mind of the person addressed; one which would be equal to a false token or a false writing, an ingenious contrivance, or unusual artifice against which common sagacity and the exercise of ordinary caution would not be a sufficient guard.⁴

In an earlier case than those above referred to, the prisoner's counsel contended that a pretence, to be indictable, must be such

¹ *Peo. v. Williams*, 4 Hill, 9. Vide *Peo. v. Thomas*, 3 Hill, 169, note a. *Peo. v. Wood*, 10 N. Y.; Leg. Obs., 61; 4 Barb., 151.

² *Peo. v. Stetson*, 4 Barb., 151.

³ *Id.*

⁴ *Peo. v. Crissie*, 4 Den., 529.

an artful misrepresentation as common prudence would not be sufficient to guard against; but the New York court of sessions said that the decisions of the English and of our own courts, under the statute relative to false pretences, did not require that the pretences should be of that artful and deceptive character.¹

But the questions whether the prosecutor had the means of detection at hand, and whether he used ordinary prudence and diligence in inquiring into the truth of the pretences, and whether the pretences were sufficient to deceive, are questions of fact for the jury.²

(f) It is an essential ingredient of the offence that the party alleged to have been defrauded should have believed the false representations to be true, otherwise he cannot claim that he was influenced by them. If in parting with his property, etc., he was himself guilty of a crime, he is not within the protection of the statute.³

And the representations must have actually influenced the defrauded person to part with his property, for if the prosecutor knew the representation to be false at the time of parting with his property, or if he disregarded the pretence and relied on his own examination as to the fact in question, the charge cannot be sustained.⁴

(g) The written instrument to which the signature is obtained must not be utterly worthless, it must be such a one as will work an injury to the party from whom it is obtained, although actual loss or injury by the party signing is not necessary; hence the obtaining the wife's signature by her husband to a deed of lands, but without her acknowledgment, is not within the statute.⁵

An attempt to obtain money from a bank by means of a forged letter transmitting a certificate of deposit, is an attempt to obtain money by a false pretence under the statute.⁶

Where the charge was that defendant being treasurer of a

¹ *Peo. v. Conger*, 1 Whee. Cr. Cas., 461-462.

² *Skiff v. Peo.*, 2 Park., 139; *Whar. Cr. L.*, 5th ed., 2131; 14 Wend., 537; 9 Ad. & El. (N. S.), 270; 10 Harris, 256,

³ *Peo. v. Stetson*, 4 Barb., 151; *Peo. v. Tompkins*, 4 Park., 224.

⁴ *Reg. v. Mills*, 7 C. C. Cas., 263; 40 Eng. L. & Equ., 562; *Reg. v. Roebuck*, 7 C. C. Cas., 126; 36 Eng. L. & Equ., 631; *Vide* 4 Den., 525; 11 Wend., 557; 13 Wend., 87.

⁵ *Peo. v. Galloway*, 17 Wend., 540.

⁶ *Peo. v. Ward*, 15 Wend., 231.

religious corporation, presented a bond, drawn up in blank, to the president for signature, it was the duty of the president to sign the bond if authorized thereto by a vote of the consistory of the corporation, and the bond embodied a recital stating such vote, the president signed the bond in reliance on this recital, it was held not a case of defrauding by color of a false writing. The false writing intended is some instrument in writing purporting to be signed by some person.¹ The offence is complete when the signature is obtained by false pretences with fraudulent intent. It is not essential that actual loss or injury should be sustained.²

An endorsement to a negotiable promissory note is a signature to a written instrument within the meaning of the Revised Statutes relative to the obtaining of such signatures by false pretences.³

(h) As to the general character of the pretences, the rule may be broadly stated that any designed misrepresentation of the defendant's means, by which he obtains goods of another, is within the statute.⁴

So, also, it is clear that a false representation of the defendant's character and personality brings him within the statute.⁵

A false representation tending merely to induce one to pay a debt previously due from him, is not within the statute against obtaining money by false pretences, though payment be thereby obtained.⁶

But it has also been held to be no defence to a charge of obtaining money by false pretences that the person from whom the money was obtained by the prisoner was, at the time, indebted to the prisoner to an amount equal to the sum obtained by the false representation, and that it was the intention of the prisoner to apply such money on such debt.⁷

The false pretences may be made where a sale of goods is had by sample. Thus, where A bought cheese of B at a fair and paid for it, but before he bought it B was offering cheese for sale there, and had bored two of the cheeses with an iron scoop, and

¹ *Peo. v. Gates*, 13 Wend., 311.

² *Peo. v. Genung*, 11 Wend., 18, *Peo. v. Gates*, 13 id., 311.

³ *Peo. v. Chapman*, 4 Park., 56.

⁴ 5th ed., Whar. Cr. L., 2085-6, *et seq.*, and cases cited.

⁵ *Id.*, 2092, *et seq.*

⁶ *Peo. v. Thomas*, 3 Hill, 169.

⁷ *Peo. v. Smith*, 5 Park., 490.

produced a piece of cheese called a "taster" at the end of the scoop, for A to taste; he did so, believing it to have been taken from the cheese, but it had not, and was of a superior kind of cheese, and fraudulently put by B into the scoop; the cheese bought by A being inferior to it. It was held that B was indictable for obtaining the price of the cheese from A by false pretences.¹

(i) In commenting upon the English statute, CHITTY says that some difficulty has arisen as to what shall be considered as a token. It is clearly not a mere affirmation or promise, but must be something real and visible, as a ring, a key or a writing, and even a writing would not suffice except it was in the name of another, or so formed as to afford more credit than the mere assertion of the party defrauding, and that letters declaring a falsehood are not privy tokens within the statute.²

It will be observed, however, that the language of our statute is that of "false tokens," while the English act above referred to uses the words "privy tokens and counterfeit letters in other men's names."

XXII. FORGERY.

Forgery at common law has been defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's rights," or more recently as "a false making, a making *malò animo* of any written instrument for the purpose of fraud and deceit." The word "making," in this last definition, being considered as including every alteration of or addition to a true instrument.³

The statutes of this state include as felonies not only the fraudulent making and alteration of writings, but the counterfeiting of coin, and the statutory offence of forgery is by law divided into four degrees. The enumeration of these offences when they amount to felonies will be found stated below, and besides those here mentioned there are several other instances of counterfeiting which are by our statute misdemeanors simply, and will be found mentioned in the subsequent chapter enumerating the misdemeanors which are created by statute.

¹ R. v. Abbott, 2 C. & K., 629.

² 3 Chit. Cr. L., 997; 2 East. P. C., 689; 2 Burr., 1128.

³ 4 Black. Com., 247; 2 East. P. C., ch. 19, § 1, p. 852; Id., § 49, p. 965; 2 Russ. on Cr., 318.

Forgery in the First Degree.—By our statutes it is provided that every person who shall be convicted of having forged, counterfeited, or falsely altered:

1. Any will of real or personal property, or any deed or other instrument, being or purporting to be the act of another, by which any right or interest in real property shall be, or purport to be, transferred, conveyed, or in any way charged or affected.

2. Any certificate or indorsement of the acknowledgment by any person, of any deed or other instrument, which, by law, may be recorded, made or purporting to have been made, by any officer duly authorized to make such certificate or indorsement; or,

3. Any certificate of the proof of any deed, will or other instrument, which, by law, may be recorded, made or purporting to have been made by any court or officer duly authorized to make such certificate with intent to defraud, shall be adjudged guilty of forgery in the first degree.¹

Also,

1. Any certificate or other public security, issued or purporting to have been issued under the authority of this State, by virtue of any law thereof, or any bill of credit heretofore issued by, or under the authority of this State, or purporting to have been so issued, by which certificate, bill or other public security, the payment of any money, absolutely or upon any contingency, shall be promised, or the receipt of any money, goods or valuable thing shall be acknowledged; or,

2. Any certificate of any share, right or interest in any public stock, created by virtue of any law of this State, issued or purporting to have been issued by any public officer, or any other evidence of any debt or liability of the people of this State, either absolute or contingent, issued or purporting to have been issued by any public officer; or,

3. Any indorsement or other instrument, transferring or purporting to transfer the right or interest of any such holder of any such certificate, public security, bill of credit, certificate of stock, evidence of debt or liability, or of any person entitled to such right or interest, with the intent to defraud the people of this State, or any public officer thereof, or any other person, shall also be adjudged guilty of forgery in the first degree.²

¹ 2 R. S., 670, § 22.

² 2 R. S., 671, § 23.

Forging Seals.—Every person who shall forge or counterfeit the great or privy seal of this State, the seal of any public officer authorized by law, the seal of any court of record, including surrogates' seals, or the seal of any body corporate duly incorporated by or under the laws of this State, or who shall falsely make or forge, or counterfeit any impression, purporting to be the impression of any such seal, shall, upon conviction, be adjudged guilty of forgery in the second degree.¹

Altering Records.—Every person who, with intent to defraud, shall falsely alter, destroy, corrupt or falsify: 1st. Any record of any will, conveyance or other instrument, the record of which shall, by law, be evidence; or, 2d. Any record of any judgment in a court of record, or any enrollment of a decree in a court of equity; or, 3d. The return of any officer, court or tribunal, to any process of any court, shall, upon conviction, be adjudged guilty of forgery in the second degree.²

False Entries in Records.—Every officer who shall falsely make, forge or alter, any entry in any book of records, or any instrument purporting to be any record or return specified in the last section, with intent to defraud, shall, upon conviction, be adjudged guilty of forgery in the second degree.³

False Certificates.—If any officer authorized to take the proof or acknowledgment of any conveyance of real estate or of any other instrument, which by law may be recorded, shall willfully and falsely certify that any such conveyance or instrument was acknowledged by any party thereto, when, in truth, no such acknowledgment was made, or that any such conveyance or instrument was proved, when, in truth, no such proof was made, he shall, upon conviction, be adjudged guilty of forgery in the second degree.⁴

Forging the name of a magistrate to a certificate of acknowledgment which such a magistrate is not authorized to take, is not within the statute.⁵ And a writing indorsed upon a conveyance of land and purporting to be the certificate of a commissioner of deeds, but not stating that the grantor acknowledged the execu-

¹ 2 R. S., 671, § 24.

² Id., § 25.

³ Id., § 26.

⁴ 2 R. S., 671, § 27.

⁵ Faulkner's Case, 3 City H. Rec., 65.

tion of the conveyance, would be invalid if genuine, and is not a criminal forgery.¹

Counterfeiting Coin.—Every person who shall be convicted of having counterfeited any of the gold or silver coins, which shall be at the time current, by custom or usage, within this State, shall be adjudged guilty of forgery in the second degree.²

Every person who shall be convicted of having counterfeited any gold or silver coin of any foreign government or country, with the intent of exporting the same to injure or defraud any foreign government, or the subjects thereof, shall be deemed guilty of forgery in the third degree.³

The moneys charged to be counterfeited must resemble the true and lawful coin;⁴ but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world.⁵ Thus, a counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal if, in appearance, it be made to resemble the true coin.⁶

In a prosecution for passing counterfeiting money, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using ordinary caution;⁷ and if this be not the case, it cannot be inferred that the counterfeit money was designed for fraudulent use.⁸

It is not usual in the courts of this State to try persons for the crime of counterfeiting the United States coin. Although our statutes as above stated provide for the punishment of this offence, the trial of such offenders is generally left to the United States courts. The question as to whether the State courts have jurisdiction of counterfeiting the coins of the United States, has been a good deal discussed. It has been repeatedly before the State courts, and different decisions have been made. A collection of

¹ *Peo. v. Harrison*, 8 Barb., 560.

² 2 R. S., 671, § 28.

³ 2 R. S., 672, § 29.

⁴ 1 Hawk. P. C., 17, § 81.

⁵ 1 Hale, 178-184, 211-215.

⁶ 1 East. P. C., ch. 4, § 13.

⁷ *U. S. v. Morrow*, 4 Wash. C. C., 733.

⁸ *U. S. v. Burns*, 5 McLean, 23.

these decisions and discussions of the question will be found in the second volume of Archibald's Criminal Practice, in the notes to section 571.

Of Making Plates Similar to Bank Bills, etc.—Every person who shall be convicted of: 1st. Having made or engraved, or having caused or procured to be made or engraved any plate in the form or similitude of any promissory note, bill of exchange, draft, check, certificate of deposit or other evidence of debt, issued by any incorporated bank in this State, or by any bank incorporated under the laws of the United States, or of any State or territory thereof, or under the laws of any foreign country or government, without the authority of such bank; or 2d. Having or keeping in his custody or possession any such plate without the authority of such bank, with the intent of using or having the same used for the purpose of taking therefrom any impression to be passed, sold or uttered; or 3d. Having or keeping in his custody or possession, without the authority of such bank, any impression taken from any such plate with intent to have the same filled up and completed for the purpose of being passed, sold or uttered; or 4th. Having made or caused to be made, or having in his custody or possession any plate upon which shall be engraved any figures or words which may be used for the purpose of falsely altering any evidence of debt issued by any such incorporated bank, with the intent of having the same used for such purpose, shall be adjudged guilty of forgery in the second degree.¹

Similitude Defined.—Every plate specified in the last section shall be deemed to be in the form and similitude of the genuine instrument imitated in either of the following cases: 1st. When the engraving on such plate resembles and conforms to such parts of the genuine instrument as are engraved; or 2d. When such plate shall be partly finished and the part so finished resembles and conforms to similar parts of the genuine instrument.²

To constitute forgery in making and engraving a plate in the form and similitude of a bank note plate, etc., it is not necessary that there should be an exact conformity between the false plate and the genuine in respect to lettering, vignettes, etc. It is enough that the false plate resembles the true sufficiently to

¹ 2 R. S., 672, § 30.

² 2 R. S., 672, § 31.

satisfy the jury that the plate was intended to be used in striking off false bills to be imposed on the public as true ones.¹

Selling, etc., Counterfeit Notes.—Every person who shall be convicted, 1st, of having sold, exchanged or delivered, for any consideration, any forged or counterfeited promissory note, check, bill, draft or other evidence of debt or engagement for the payment of money, absolutely or upon any contingency, knowing the same to be forged or counterfeited, with intention to have the same uttered or passed; or, 2d, of having offered any such note or other instrument for sale, exchange or delivery, for any consideration, with the like knowledge and with the like intention; or, 3d, of having received any such note or other instrument upon a sale, exchange or delivery for any consideration, with the like knowledge, and with the like intention, shall be adjudged guilty of forgery in the second degree.²

Forging Certain Instruments.—Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit:

1. Any instrument or writing, being or purporting to be any process, issued by any competent court, magistrate or officer, or being, or purporting to be any pleading or proceeding, filed or entered in any court of law or equity, or being, or purporting to be any certificate, order or allowance by any competent court or officer, or being, or purporting to be any license or authority authorized by any statute.

2. Any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished, or by which any rights or property whatever shall be, or purport to be transferred, conveyed, discharged, diminished or in any manner affected, the punishment of which is not hereinbefore prescribed, by which false making, forging, altering or counterfeiting any person may be affected, bound or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree.³

Bank notes wholly printed or engraved are the subjects of

¹ *Peo. v. Osmer*, 4 Park., 242.

² 2 R. S., 673, § 32.

³ 2 R. S., 673, § 33.

forgery, and counterfeits of them, wholly printed or engraved, made with intent to defraud, are forgeries within the statute.¹

A paper in the following words: "Mr. S., let the bearer trade \$13.25, and you will much oblige," etc., is an order for the delivery of goods within the statute.² But an order, to "Pay to L. or bearer, fifteen hundred dollars in N. Myer's bills or yours," is not within the act to prevent forgery. Its language is too indefinite to be deemed an order for the payment of money or the delivery of goods.³

A paper in these terms: "Mr. T. will oblige Mrs. Wells with the following articles," specifying certain merchandize, is an order for delivery of goods.⁴ The forgery of an order for the delivery of goods in the name of a person who, by reason of legal disability, would not have been liable on such order, *e. g.*, a married woman, is within the statute.

An order soliciting a favor, and not imparting a right in the drawer, and a duty in the drawee, is not an order for money, within the act relative to forgery.⁵ But a check is an order for the payment of money within the act.⁶

The making up of a counterfeit order for the delivery of property in the name of a third person, is a forgery under the statute.⁷

Forging Public Accounts.—Every person who, with intent to defraud, shall make any false entry or shall falsely alter any entry made in any book of accounts kept in the office of the comptroller of this State, or in the office of the treasurer, or of the State engineer and surveyor, or of any county treasurer, by which any demand or obligation, claim, right or interest, either against or in favor of the people of this State, or any county or town, or any individual, shall be, or shall purport to be discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree.⁸

Forgery in Books of Moneyed Corporations.—Every person

¹ Peo. v. Rhoner, 4 Park., 166.

² Peo. v. Shaw, 5 John., 236.

³ Peo. v. Farrington, 14 John., 348.

⁴ Heath's Case, 2 City H. Rec., 54.

⁵ Peo. v. Thompson, 2 John. Cas., 342.

⁶ Peo. v. Howell, 4 John., 296.

⁷ Nookes v. The Peo., 25 N. Y., 380

⁸ 2 R. S., 673, § 34.

who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within this State, or in any book of accounts kept by any such corporation or its officers, and delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim or credit shall be or shall purport to be discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree.¹

Having Counterfeit Notes in Possession.—Every person who shall have in his possession any forged, altered or counterfeit negotiable note, bill, draft or other evidence of debt, issued or purporting to have been issued by any corporation or company duly authorized for that purpose by the laws of the United States, or of this State, or of any other State government or country, the forgery of which is hereinbefore declared to be punishable, knowing the same to be forged, altered or counterfeited, with intention to utter the same as true or as false, or to cause the same to be so uttered, with intent to injure or defraud, shall, upon conviction, be subject to the punishment prescribed for forgery in the second degree.²

To constitute the possession of counterfeit money, it need not be found on the person. It is sufficient if it be under the control of the prisoner, and this may be inferred from the circumstances.³

To have a counterfeit bill in possession, with an intention of selling it as counterfeit, is contrary to the statute.⁴

Where a quantity of counterfeit bills are found in the possession of the prisoner at the same time, he cannot be subjected to more than one prosecution for passing and having them in possession with intent to pass them, as this is but one offence.⁵

Though the prisoner came by the forged bill *bona fide*, if he afterwards had reasonable grounds for believing it to be bad, and notwithstanding passed it, he is guilty.⁶

Passing Other Counterfeit Instruments.—Every person who

¹ 2 R. S., 673, § 35.

² 2 R. S., 674, § 36.

³ Conner's case, 5 City H. Rec., 115.

⁴ More's case, 2 City H. Rec., 84.

⁵ Lamphier's case, 5 City H. Rec., 179.

⁶ Gallagher's case, 5 City H. Rec., 1; Riley's case, id., 87.

shall have in his possession any forged or counterfeited instrument, the forgery of which is hereinbefore declared to be punishable (except such as are enumerated in the last section), knowing the same to be forged, counterfeited, or falsely altered, with intention to injure or defraud, by uttering the same as true or false, or by causing the same to be so altered, shall be subject to the punishment provided for forgery in fourth degree.¹

Possessing Counterfeit Coins.—Every person who shall have in his possession any counterfeit of any gold or silver coin, which shall be at the time current in this State, knowing the same to be counterfeited, with intention to defraud or injure by uttering the same as true or as false, or by causing the same to be so uttered, shall, upon conviction, be adjudged guilty of forgery in the fourth degree.²

Uttering Counterfeits.—Every person who shall be convicted of having uttered and published as true, and with intent to defraud, any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin, the forging, altering or counterfeiting of which is hereinbefore declared to be an offence, knowing such instrument or coin to be forged, altered or counterfeited, shall suffer the same punishment assigned for the forging, altering or counterfeiting the coin or instrument so uttered, except as in the next section specified.³

But if it appear, upon the trial of the indictment, that the accused received such forged or counterfeited instrument or coin of another in good faith, and for a good or valuable consideration, without any circumstances to justify a suspicion of its being forged or counterfeited, the jury may find the defendant guilty of forgery in the fourth degree.⁴

False Instrument in One's Own Name under the Pretence that it is the Act of Another who bears the same Name.—If any one shall, with intent to injure and defraud, make any instrument in his own name intended to create, increase, discharge, defeat, or diminish any pecuniary obligation, right or interest, or to transfer or affect any property whatever, and shall utter or pass it under the pretence that it is the act of another who bears the

¹ 2 R. S., 674, § 37.

² Id., § 38.

³ Id., § 39.

⁴ Id., § 40.

same name, he shall, upon conviction, be adjudged guilty of forgery in the same degree as if he had forged the instrument of a person bearing a different name from his own.¹

Where one who was not the true consignee, but was of the same name, knowingly and with a fraudulent intent, received and indorsed the permit of delivery, but without imitating the true consignee's handwriting, it was held that he was guilty of forgery.²

So, also, it is forgery for a person of the same name, not the payee of a bill, to transfer it by indorsements, knowing himself not be the payee.³

Counterfeiting Brands, etc., in Relation to Salt Works.—Every person who shall either, 1st. Falsely and fraudulently make or counterfeit, or knowingly aid and assist the fraudulent making or counterfeiting of the mark or brand of any superintendent, on any barrel, cask, sack or box; or 2d. Falsely and fraudulently make, alter or counterfeit, or knowingly aid and assist in the false and fraudulent making, altering or counterfeiting of any inspection bill or any receipt of duties thereon, with intent to defraud the people of this State, shall be deemed guilty of a felony.⁴

Total Erasure, etc., of Instruments.—The total erasure or obliteration of any instrument or writing with intent to defraud, by which any pecuniary obligation or any right, interest or claim to property shall be, or shall be intended to be created, increased, discharged, diminished, or in any manner affected, is deemed forgery, in the same manner and in the same degree as the false alteration of any part of such instrument in writing.⁵

Joining Parts of Instruments.—Where different parts of several genuine instruments shall be so placed or connected together as to produce one instrument, with intent to defraud, the same is deemed forgery in the same manner and in the same degree as if the parts so put together were falsely made or forged.⁶

What to be Writings.—Every instrument, partly printed and partly written, or wholly printed, with written a signature there-

¹ 2 R. S., 675, § 41. See post.

² Peo. v. Peacock, 6 Cow., 72.

³ Graves v. A. E. Bank, 17 N. Y., 205.

⁴ Laws 1859, ch. 346, p. 807, § 93.

⁵ 2 R. S., 675, § 43.

⁶ 2 R. S., 675, § 44.

to, and every signature of an individual, firm or corporate body, or of any officer of such body, and every writing purporting to be such signature, shall be deemed a writing and a written instrument within the meaning of the above provisions of the statute.¹

Pretended Signatures to Corporate Acts.—The false making, forging, or counterfeiting of any evidence of debt, issued or purporting to have been issued by any corporation having authority for that purpose, to which shall be affixed the pretended signature of any person as an agent or officer of such corporation, is deemed forgery in the same degree and in the same manner as if such person was at the time an officer or agent of such corporation, notwithstanding such person may never have been an agent or officer of such corporation, or notwithstanding there never was any such person in existence.²

Fraudulent Issue and Sale of Bonds of Incorporated Companies by Officers and Agents.—The statute further provides for the fraudulent and unauthorized issue and transfer of the stock and bonds of corporations and joint stock companies, declaring the same a felony and subjecting the offender to imprisonment in a State prison, and punishment in addition by a fine not exceeding three thousand dollars.³

Forgery of Railroad Tickets.—Every person who shall be convicted of having forged, counterfeited or falsely altered railroad passenger tickets before or after the same are issued to its receivers or agents for sale, or whether indorsed by such receivers or not, or having sold, exchanged or delivered, for any consideration, any such forged or counterfeited railroad ticket, knowing the same to be forged or counterfeited, with intent to injure or defraud, or having offered any such forged or counterfeited railroad ticket for sale, exchange or delivery, for any consideration, with the like knowledge and intent, is guilty of forgery in the third degree.⁴

And every person who shall have in his possession any such forged or counterfeited railroad ticket, knowing the same to be forged, counterfeited or falsely altered, with intention to injure

¹ 2 R. S., 575, § 45.

² 2 R. S., 675, § 47.

³ 2 R. S., 676, §§ 48, 49; Laws 1855, ch. 155.

⁴ 2 R. S., 680, § 78; Laws 1855, ch. 499, § 4.

or defraud by uttering the same as false or true, or by causing the same to be uttered, or by the use of the same to procure a passage in the cars of the railroad company, by which such ticket purports to have been issued, is subject to the punishment by law for forgery in the fourth degree.¹

Of the Making or Alteration necessary to constitute Forgery of a Written Instrument.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration or erasure even of a letter, in any material part, of a true instrument whereby a new operation is given to it, will amount to a forgery, and this, though it be afterwards executed by another person ignorant of the deceit.²

So, also, the fraudulent application of a true signature to a false instrument, for which it was not intended, and *vice versa*, will be a forgery.³

And to write an instrument fraudulently over the signature of another, which if true would be to his prejudice without his knowledge, is a forgery.⁴

So if finding another's name at the bottom of a letter at a considerable distance from the other writing, the prisoner caused the letter to be cut off and a general release to be written above the name, and then take off the seal and fix it under the release.⁵

It is not necessary that the whole instrument should be fictitious; making a fraudulent insertion, alteration or erasure in any material part of a true document, by which another may be defrauded; the fraudulent application of a false signature to a true instrument, or a real signature to a false one, and the alteration of the date of a bill of exchange after acceptance, by which its payment may be accelerated, are forgeries.⁶ So, altering a banker's one-pound note, by substituting the word ten for the word one, is a forgery.⁷

If a note be made payable at a country banker's at their bank-

¹ 2 R. S., 680, § 79; Laws 1855, ch. 499., § 5.

² 2 East. P. C., ch. 19, § 4, p. 855.

³ Id.; 2 Russ. on Cr., 319.

⁴ Martin's Case, 6 City H. Rec., 27.

⁵ 3 Inst., 171; 1 Hawk. P. C., ch. 70, § 2.

⁶ 1 Hale, 683-4-5; 47 R., 320.

⁷ Russ & Ry. C. C., 101; 2 East. P. C., 979.

er's in London, who fails, it is a forgery to introduce a piece of paper over the names of the London bankers who have so failed, containing the names of another banking-house in London.¹

Thus, the fraudulent alteration of a material part of a deed is a forgery, as the making a lease of the manor of Dale, appear to be a lease of the manor of Sale, by changing the letter D into an S, or the making a bond for five hundred pounds, expressed in figures, seem to have been made for five thousand, and though it seems to have been thought that a deed so altered is more properly to be called a false than a forged deed, not being forged in the name of another, nor his hand or seal counterfeited, yet, according to the better opinion, such an alteration amounts to forgery, on the ground that the fraud and villainy are the same as if there were an entire making of a new deed in another's name; and also that a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such alteration, is no more his deed than a stranger's.²

So, also, it is forgery for a man, who is ordered to draw a will for a sick person, to insert legacies in it of his own head.³ And so, if a man insert in an indictment the names of those against whom in truth it was not found.⁴

Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment, would also fall within the same rule.⁵ It is forgery for a person having authority to fill up a blank acceptance for one sum only, to fill up the bill for a larger sum.⁶

The filling in the body of a blank check to which a signature is attached, without any authority, is a forgery.⁷

Indorsing a bill of exchange by a person of the same name as the payer, and uttering a note in the same name as that of the prisoner, has been held to be forgery.⁸

It is, however, said that a bill of exchange must be complete

¹ Russ & Ry. C. C., 164; 2 Tounb., 328; 2 Leach, 1040.

² 1 Hawk. P. C., ch. 70, § 2; 3 Inst., 169; 2 Russ on Cr., 320.

³ 3 Inst., 170; 1 Hawk. P. C., ch. 70, § 2.

⁴ 3 Mod., 66; Id.

⁵ 2 East. P. C., p. 853; 4 T. R., 320.

⁶ Rex v. Hart, R. & M. C. C. R., 486; 7 C. & P., 652; Reg v. Wilson, 1 D. C. C., 284; Lead. Cr. Cas., vol. 1, p. 477; 2 C. & K., 527.

⁷ Wright's Case, 1 Lew., 135.

⁸ 2 East. P. C., 963; 2 Leach, 775.

at the time when the name of another is written upon it, or it is not a forgery of the acceptance.¹

The adopting a false description and addition where a false name was not assumed, and where there was no person answering the description or addition, was held not a forgery.²

In Shepherd's case it was holden to be forgery to draw a draft upon a banker in a fictitious name, assumed by the party at the time for the purpose of fraud and to avoid detection, though the credit were given to the person of such party.³

It is forgery to give to the drawee of a bill of exchange a receipt in a false name as for the prisoner's own name, for the contents of the bill, such bill being indorsed in blank, if it be done fraudulently and to escape detection, although no additional credit be gained thereby to the prisoner.⁴

A forged order on a bank in a fictitious name amounts to forgery.⁵

So it is forgery to indorse a bill in a fictitious name, although the money might have been as well obtained by indorsing it in the real name of the person who uttered it.⁶

But it has been said that a man cannot be guilty of forgery by a bare *non feasant*, as if in drawing a will he should omit a legacy which he was directed to insert; but it has been holden that if the omission of a bequest to one, cause a material alteration in the limitation of a bequest to another, as where the omission of a devise for an estate for life to one man cause a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery.⁷

The acceptor of a written order for the delivery of goods paid it and returned it to the drawee, who altered its date with a fraudulent intent; it was held that the alteration was not forgery. 1st. The instrument after payment no longer subsisted. 2d. The

¹ Reg. v. Cooke, 8 C. & P., 582; Reg v. Butterwich, 2 M. & Rob., 196.

² Rex v. Webb, Russ. & Ry., 405.

³ Shepherd's Case, O. B., Sept., 1781; 1 Leach, 226; 2 East. P. C., 967.

⁴ Taylor's Case, O. B., 1779; 1 Leach, 214; 2 East. P. C., 960.

⁵ 1 Leach, 94; 2 East. P. C., 940.

⁶ Taffit's Case, 1 Leach, 172; 2 East. P. C., 959. See, also, Bolland's Case, 1 Leach, 83; 2 East. P. C., 958.

⁷ 1 Hawk. P. C., ch. 70, § 6; 2 East. P. C., p. 856.

change in the date was not a false making. 3d. The order had no tendency to aid the fraud.¹

Of the Resemblance to the Genuine Instrument.

In relation to the circumstance that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, it is not necessary that the resemblance to the known instrument shall be exact; it seems to be sufficient if the instruments be so far alike that persons in general, using their ordinary observations upon the subject may be imposed upon by the deception, though it would not impose upon persons having particular experience in such matters.²

Thus, where the prisoner was indicted for the forgery of bank notes, and a witness for the prosecution who came from the Bank of England stated that he could not have been imposed upon by the forged notes, the difference between them and the true notes being to him very apparent in several particulars, but it appeared that others had been deceived at first by them, though they were ill executed, the judge proceeded upon the foregoing principles.³

A mere literal mistake will not make any difference. Thus, in a case where the prisoner in forging an order for the delivery of goods blundered in spelling the name, using "Desemockex" for "Desormeaux," no stress was laid on such circumstance.⁴

But a forgery may be committed of a will though it be signed in the wrong Christian name of the person whose will it purports to be.⁵

If the instrument be good in form on the face of it, it is sufficient.⁶ But it will not be forgery when the false instrument has no semblance of the true one or is illegal in its very frame.⁷

Engraving a counterfeit stamp, like in some parts to a genuine stamp, and unlike in others, and then cutting out the unlike parts and concealing the part cut out, and then uttering it, is forgery.⁸

¹ *Peo. v. Fitch*, 1 Wend., 198. See *Peo. v. Cady*, 6 Hill, 490.

² 2 East. P. C., pp. 858-950.

³ 2 East. P. C., p. 950.

⁴ 2 East. P. C., 952; 1 Leach, 540.

⁵ *Rex v. Fitzgerald and Lee*, O. B., 1741; 1 Leach, 20; 2 East. P. C., 953.

⁶ 2 Russ. on Cr., 353.

⁷ 1 Leach, 204; 2 East. P. C., 952.

⁸ *Robinson's case*, 2 Roll. R., 50; 1 East. P. C., 86.

To constitute forgery it is not essential that the handwriting should resemble his whose name is forged.¹

And the omission from the name forged of the initial of the middle name is immaterial.²

Of the Validity of the Thing Forged if Genuine.

Sir WILLIAM RUSSELL, citing Hawkins and East., says: "Though it is said to be no ways material whether a forged instrument be made in such a manner as that if it were in truth such as it is counterfeited for, it would be of validity or not, yet it seems to be material that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame."³

One of the older definitions of forgery was given as "the false making of an instrument which purports *on the face of it* to be good and valid for the purposes for which it was created, with a design to defraud."⁴

Thus, upon the principle of its not being necessary that the instrument charged to be forged should be such as would be effectual if it were a true and genuine instrument, it was held that forgery might be committed of an instrument on unstamped paper.⁵

So also it was held upon the ground that it is not material whether a forged instrument be so made that if it were in truth such as it is counterfeited for, it would be a validity or not, that the forgery of a protection in the name of A. B., as being a member of Parliament, who in truth at the time was not a member, is as much an offence at common law as if he were so.⁶

So also forgery may be committed by the false making of an instrument purporting to be the will of a person who is still living, notwithstanding the objection that during the life of a person his will is ambulatory and can have no validity as a will until his death.⁷

The rule is laid down by CHITTY to be that it is of no conse-

¹ Dobb's case, 6 City H. Rec., 61.

² Gotobed's case, 6 City H. Rec., 25.

³ 2 Russ. on Cr., 344.

⁴ Palmer's case, 1 Leach, 367.

⁵ 1 Leach, 275; 2 East. P. C., 955.

⁶ 1 Hawk. P. C., ch. 70, § 7; 2 East. P. C., 948.

⁷ 2 Russ. on Cr., 345, and cases cited.

quence whether the counterfeited instrument be such as if real, would be effectual to the purpose it intends, so long as there is a sufficient resemblance to impose on those to whom it is uttered.¹

To constitute forgery of a written instrument, it is sufficient that the instrument is one which upon its face would have the effect to defraud those who act upon it as genuine, or the person in whose name it is forged. It need not be shown to be an instrument of any particular name or character, need not possess the legal requisites of a bill of exchange, order for the payment of money, or the like; nor is it necessary that the person in whose name it is made should have the legal capacity to make such instrument, or that the person to whom it is directed should be bound to act upon it if genuine. Though all parties to a bill are fictitious yet if it is passed as genuine, this is a forgery.²

An instrument valid on its face is equally the subject of felonious forgery or a felonious uttering, though collateral or extrinsic facts, of whatever character, may exist that would render it absolutely void if genuine.³

An instrument purporting to be void on its face, *e. g.*, a note payable in labor, and not expressing any consideration and not shown to be operative by averment, if genuine, is not the subject of forgery.⁴

A paper purporting to be a sealed power of attorney to collect a pension, but not under seal, was held not within the statute.⁵

Forgery of the Names of Fictitious and non-Existing Persons.

With respect to the cases in which the name used, has been that of a non-existing and fictitious person, it is laid down as a clear proposition, that the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom credit was due.⁶ So, a person indorsing a fictitious name on a

¹ 3 Chit. Cr. Law, 1035.

² *Peo. v. Krunmer*, 4 Park., 217.

³ *Peo. v. Rathbun*, 21 Wend., 509.

⁴ *Peo. v. Shall*, 9 Cow., 778; *Peo. v. Galloway*, 17 Wend., 540; *Peo. v. Harrison*, 8 Barb., 560.

⁵ *Scholtz's Case*, 4 City H. Rec., 163.

⁶ 2 East. P. C., ch. 19, § 46; *Riley's Case*, 5 City Hall Rec., 87; *Gotobed's Case*, 6 Id., 25; *Grant's Case*, 3 Id., 142.

bill of exchange, to give it currency, will be guilty of forgery.¹ So, where a person uttered a forged deed purporting to be a power of attorney from a non-existing person, it was held forgery.² And it makes no difference, though the prisoner's real name would have carried as much credit as the assumed name.³

It is agreed to be immaterial whether any additional credit be gained by using the false name.⁴ So if a person write an acceptance in his own name, to represent a fictitious firm, with intent to defraud, it is a forged acceptance, for if an acceptance represent a fictitious firm, it is the same as if it represented a fictitious person.⁵

It should satisfactorily appear that the fictitious name was assumed for the purpose of fraud in the particular instance of the forgery in question, and that it will not be sufficient to show that the fictitious name had been assumed for general purposes of concealment and fraud, for in a case in which the prisoner was charged with forging an acceptance upon a bill of exchange in the name of Scott, the majority of judges being of the opinion that it did not sufficiently appear upon the evidence that the prisoner had not gone by the name of Scott before the time of accepting the bill in that name, or that he had assumed the name for that purpose, it was held that a conviction for such forgery was wrong.⁶ But it was subsequently said that forging in a false name, assumed for concealment, with a view to a fraud, of which the forgery is a part, is sufficient to constitute the offence, and if there be proof of the prisoner's real name, it is for him to prove that he had used the assumed name before the time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question.⁷

It will be observed, that one of the sections of our Revised Statutes provide for the making of instruments in one's own name, under the pretence that it is the act of another who bears the same name.⁸

¹ Wilks' Case, Badmire, 2 East. P. C., ch. 19, § 46.

² Lewis' Case, Fost., 116.

³ Rex v. Marshall, Russ & Ry., 75.

⁴ 2 Russ on Cr., 333, and cases cited.

⁵ Rex v. Rogers, 8 C. & P., 629.

⁶ Rex v. Bontien, Russ & Ry., 260.

⁷ Rex v. Forbes, 7 C. & P., 224.

⁸ 2 R. S., 675, § 41, post.

Of the Intent to Deceive and Defraud.

The very act of the forgery itself will be sufficient to imply an intent to defraud; or, at all events, it will be sufficient if, from the circumstances of the case, the jury can fairly infer that it was the intention of the party to utter the forged instrument, for the necessary effect of the uttering, if successful, must be to defraud.¹

The law presumes an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution it would not be likely to impose on him;² and although the object was to defraud whoever might take the instrument, and the intention of defrauding the person in particular who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation.³

The statutory provision in respect to the intent to defraud, is as follows:

"Whenever an intent to defraud is required to constitute forgery, it shall be sufficient if such intent appear to defraud the United States, any State, or territory, any body corporate, any county, city, town, or village, or any public officer in his official capacity, any copartnership, or any one of such partners, or any real person whatever."⁴

The forgery consists in the endeavoring to give an appearance of truth to a mere deceit and falsity. Thus it is said by HAWKINS, that the notion of forgery does not seem so much to consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavoring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which, in truth and justice, it ought not to have done.⁵

Knowingly uttering a forged bill to a person, meaning that he

¹ 2 Arch. Cr. Pr., 546.

² Com. v. Stephenson, 11 Cush., 481.

³ U. S. v. Shelmire; Rex v. Mazagora, Russ. & Ry. 291; 1 Baldw., 371.

⁴ 2 R. S., 675, § 46.

⁵ 1 Hawk. P. C., ch. 70, § 2.

should believe it to be genuine, is sufficient, although the utterer intend to provide for the payment of the bill.¹

In *Reg. v. Beard*, (8 C. & P., 143,) COLERIDGE, J., said: "As to the intent, I must tell you that every man is taken to intend the natural consequences of his own act. If I present to you a bill with the name of one of my friends upon it, knowing it to be forged, it would be idle to say that I had no intent to injure him." And in another case the court observed: "If a person knowingly pays a forgery away as a good bill it is a consequence, and almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, and also the person whose name is used; as everything which is the natural consequence of the act must be taken to be the intention of the prisoner."²

In another case, PARKE, B., in addressing the jury, said: "With respect to the intent to defraud, I have no doubt that you will take the law from me, which is this: that a person is guilty of forgery notwithstanding he may himself intend ultimately to take up the bill, and may suppose that the party whose name is forged will be no loser. If in the present case you are satisfied that the prisoner knew this acceptance to be forged, and uttered it as true, and believed that the bankers would advance money on it, which they would not otherwise do, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act. It appears that this bill has since been paid by the prisoner, but that will make no difference if the offence has been once completed at the time of the uttering."³

Upon an indictment for forgery and uttering an order for the payment of money, signed John Phillips, with intent to defraud F. Rufford and others, it appeared that the order was presented at Messrs. Rufford's bank, but they would not pay the amount, and no person named John Phillips kept cash with them, it was objected that there could be no intent to defraud Messrs. Rufford, as there was not the most remote chance of their paying the money; but it was held that the prisoner's going to Messrs.

¹ *Reg v. Hill*, 2 Moo. C. C. R., 30; 8 C. & P., 274.

² *Reg v. Cooke*, 8 C. & P., 586.

³ *Reg v. Geach*, 9 C. & P., 499.

Rufford's and presenting the paper for payment was quite sufficient evidence of an intent to defraud them.¹

If a person gives his employer a forged receipt for money, with intent to make the employer believe that money already obtained has been applied in a certain way, he is guilty of uttering with intent to defraud his employer.²

The intention to defraud is necessary to the completion of the offence, though it seems that it is not necessary to show that the prosecutor was actually defrauded.³

And there need not be an intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime; for if a person do an act the probable consequence of which is to defraud, it will in contemplation of law constitute a fraudulent intent.⁴

If a party either have authority to use the name of another or *bona fide* considers that he has such authority, it is not forgery to use such name.⁵ But nothing short of such belief, and a fair ground for that belief from the acts of the party whose name is used, is sufficient.⁶ And if from the dealings between the parties the prisoner had fair ground to believe that he had authority to use the name, it is not forgery.⁷ If one of three persons having authority jointly to draw out money from a bank, draw out the money by a check signed by himself and two strangers, who personate the two having authority, it is a forgery.⁸

The very essence of forgery is the intent to defraud, and therefore the mere imitation of another's writing, the assumption of a name or the alteration of a written instrument where no person can be injured, does not come within the definition of the offence.⁹

¹ *Rex v. Crowther*, 5 C. & P., 316; *Vide R. v. Houtson*, 2 Car. & K., 777. *Contra, R. v. Marcus*, 2 Car. & K., 356, to the effect that where no fraud could have been effected, then no fraud could be intended.

² *Rex v. Martin*, R & M. C. C. R., 483; 7 C. & P., 549.

³ *Com. v. Ladd*, 15 Mass., 526; *Penn v. Misnor*, Add. Rep. 44; 1 Bay., 120; *Thatch., Cr. Cas.*, 132, *Grafton Bank v. Flanders*, 4 N. H. Rep., 239; *Van Horne v. State*, 5 Ark. Rep., 349.

⁴ 2 Russ. on Cr., 362; *Talloch v. Harris*, 3 T. R., 176; *Arnold v. Cost.*, 3 G. & J., 219; *Bevington v. State*, 2 Ohio R. (N. S.), 160.

⁵ *Rex v. Forbes*, 7 C. & P., 224.

⁶ *Reg. v. Beard*, 8 C. & P., 143.

⁷ *Reg. v. Parish*, 8 C. & P., 94.

⁸ *Dixon's Case*, 2 Lew., 178.

⁹ 2 Stra., 747; 2 Lord Raym., 1461; 3 Chit. Cr. L., 1039, a.

The question as to the party's intent is for a jury, and the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him, and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation.¹

Of the Uttering.

The word "uttering" would seem to be more accurately defined by the word "negotiating," which means, in its popular sense, an intercourse of business, trafficking or treating, accordingly, not only a sale or paying away a counterfeit note or indorsement, but obtaining credit on it in any form, as by leaving it in pledge, or indeed, offering it in dealing, though it be refused, will amount to an uttering and publishing. The delivery of a counterfeit note to an innocent person for the purpose of having it passed away, is *per se* an uttering by the prisoner, although in another case, the uttering seems not considered complete till the innocent party has actually tendered the note in payment. This rule is based upon the doctrine that where an innocent person is employed for a criminal purpose, the employer must be answerable. Uttering implies two parties, a party acting, and a party acted upon. If, by the way of sale, there must be a vendee; if, by pledge, there must be a pledgee; if, by offer, there must be one present to hear the offer, and if, simply by declaring its goodness, there must be some one addressed as a reader or hearer. The crime of uttering and publishing, is therefore not complete until the paper is transferred, and comes to the hands or possession of some person other than the felon, his agent, or servant.²

To utter and publish an instrument, is to declare or assert directly or indirectly, by words or actions, that it is good.³

Procuring a counterfeit bill to be passed by an ignorant boy

¹ R. & Ry. C. C., 291.

² *Peo. v. Rathbun*, 21 Wend., 509.

³ Arch Cr. Pr., vol. 2, 846, note.

as a true one, was holden a sufficient passing, under the Massachusetts statute.¹

It is not necessary, in order to constitute the offence of uttering, that the defendant should have the knowledge of the false making at the time of the forgery.² So, depositing a forged bill of exchange with a banker as security, has been holden to be an uttering of it.³

Where a prisoner, charged with uttering a forged note to A B, knowing it to be forged, gave forged notes to a boy who was not aware of their being forgeries, and directed the boy to pay away the notes described in the indictment at A B's, for the purchase of goods, and the boy did so, and brought back the goods and the change to the prisoner, it was held an uttering by the prisoner to A B.⁴

So, also, it was held that the delivering of a box containing, among other things, forged stamps, to the party's own servant, that he might carry them to an inn, to be forwarded by a carrier to a customer in the country, is an uttering.⁵

It has been holden to be forgery to utter a note as the note of another, though made in the prisoner's own name.⁶

It is said to be clearly settled, that in the case of a forgery committed in the name of a person really existing, it matters not whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such, the credit in such case not being given to the imposter personally, without any relation to another, but to that other person whom he represents himself to be.⁷

The instrument, must, in itself, be forged, for if a man merely pass for another, who is the maker or indorser of a true instrument, it is no forgery, though it may comprise the offence of false pretences.⁸

XXIII. GAMBLERS.

The statute making a common gambler guilty of felony is as follows:

¹ Com. v. Hall, 11 Mass., 136.

² Com. v. Houghton, 8 Mass., 107.

³ R. v. Cook, 8 Car. & P., 582.

⁴ Rex v. Giles, Car. C. L., 191.

⁵ Rex v. Callicott, R. & R. C. C., 212.

⁶ 2 Leach, 775; 2 East. P. C., ch. 19, § 49, p. 963.

⁷ 2 East. P. C., 962.

⁸ 1 Leach, 229.

If any person for gambling purposes shall keep or exhibit any gambling table, establishment, device or apparatus, or if any person or persons shall be guilty of dealing faro, or banking for others to deal faro, or acting as lookout or game keeper for the game of faro, or any other banking game where money or property is dependent on the result; or if any person shall sell or vend what are commonly known as or are called lottery policies, or any writing, card, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or if any person shall endorse a book or any other document for the purpose of enabling others to sell or vend lottery policies, he shall be taken and held as a common gambler, and is guilty of a felony.¹

The statute further specifies the duty of magistrates upon complaint being made to them, the issuing and serving of warrants, and the breaking open and entering of houses or places where gambling tables and apparatus may be, and provides for the seizure and detention of the same, and disposition to be made thereof.²

The statute further provides that if any person shall, through invitation or device, persuade or prevail on any other person to visit any room, building, arbor, booth, shed, tenement, boat or float, kept for the purpose of gambling, he shall, upon conviction thereof, and upon proof that the person so invited has gambled therein, be held responsible for the money or property lost by such person so invited or persuaded by reason of such invitation or device, and in addition thereto shall also be guilty of felony.³

XXIV. HOMICIDE.

Homicide, of which murder is the highest and most criminal species, is of different degrees, according to circumstances. The term in its largest sense is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful. It is lawful when done in lawful war upon an enemy in battle; it is lawful when done by an officer in the execution of justice upon a criminal pursuant to a

¹ Laws 1851, ch. 504, § 2, as amended by Laws of 1855, ch. 214.

² See Laws 1851, ch. 504.

³ Id., § 7.

proper warrant; it will be justifiable and of course lawful necessary self defence.¹

The act of homicide is either occasioned by mere accident, founded in the dispensations of public justice, or in self-preservation, or in a sudden transport of passion, or in malice; and these different views it is capable of a great variety of gradations, from absolute innocence to the most aggravated guilt.²

Homicide, both at the common law and by our Revised Statutes, is divided into

I. Murder.

II. Manslaughter.

III. Excusable homicide.

IV. Justifiable homicide.

Our statutes declare that the killing of a human being without the authority of law, by poison, shooting, stabbing, or any other means, is either murder in the first degree, in the second degree manslaughter or excusable or justifiable homicide, according to the facts and circumstances of each case.³

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome.⁴

And if a man deliberately do a thing calculated to endanger the life of another, and it causes his death, he is guilty of homicide.

As where a son carried his sick father from one town to another on a frosty morning against his will, whereof he died.⁵

So if a man purposely let loose a wild or unruly beast which he knows would hurt persons, and it kill a man.⁶

Or if a jailor confine a prisoner against his will in a room with a man who has the small pox and he catch the disease and die of it.⁷

So giving an undue quantity of spirits to a child of tender age whereby the child is killed.⁸

¹ Shaw, Ch. J.; Com. v. Webster, 5 Cush., 295.

² Prin. Pen., 4, 206.

³ Laws 1862, ch. 197.

⁴ 4 Bla. Com., 196; 1 Hale, 431; 1 Hawk. P. C., ch. 31, § 4.

⁵ 1 Hawk., ch. 31, § 4.

⁶ 1 Hale, 431-432; 1 Hawk., ch. 31, § 5.

⁷ 1 Hale, 431.

⁸ Post., 322.

⁹ R. v. Martin, 3 C. & P., 211.

Or where a woman delivered of a child left it naked and exposed on the roadside where it died.¹ All these and many more similar cases have been holden to be homicides.

But it was said at the common law that there must be some external violence or corporal damage to the party, and therefore, where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such a passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice.²

Whether or not the giving of false evidence against another upon a capital charge with intent to take away his life (the party being executed upon such evidence) will amount to murder, seems to be a doubtful point.³

Murder.

This kind of homicide at the common law was defined by Lord COKE to be, when a man, of sound memory and of the age of discretion, unlawfully kills any reasonable creature, in being and under the king's peace, by malice prepense or aforethought, either expressed by the party or implied by law.⁴

Murder at the common law consisted of but one degree; but the Legislature of this State has divided the crime into two degrees. The principle in which rests the statutory distinction between murder in the first and murder in the second degree, is that of the *lex talionis*, and took its origin from the admitted harshness of inflicting death for a homicide where death was not intended.⁵

The provisions of the statutes of this State, in relation to the offence of murder, are as follows:

Such killing, unless it be manslaughter, or excusable or justifiable homicide, as provided by the statutes, shall be murder in the first degree in the following cases:

First.—When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

¹ R. v. Walters, C. & M., 164; 2 C. & R. 864.

² 1 Hale, 427-429; 1 East. P. C., ch. 5, § 13; Com. v. Webster, 5 Cush., 295.

³ Mirror, ch. 1, § 9; Brit., ch. 52; Bract., 1, 3, ch. 4; 1 Hawk. P. C., ch. 31, § 7; 3 Inst., 43; Foxt., 131-132; 1 East. P. C., 333, n.; 4 Bla. Com., 196, 197.

⁴ 3 Inst., 47, 51; 1 East. P. C., 214.

⁵ Wh. on Hom., 354.

Second.—When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

Third.—When perpetrated in committing the crime of arson in the first degree.

Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as provided by the statutes, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, is murder in the second degree.¹

(a) At the common law one of the requisites of murder was that it should be committed with malice prepense or aforethought. It will be noticed that our statute uses the words "premeditated design." The Mississippi statute uses the same words; and it was judicially held in that State that, "malice aforethought" and the words "premeditated design" were, in legal effect, regarded as the same.² The phrase "malice aforethought" may, therefore, be said to include premeditation and an intent to kill. Malice, in its legal sense, denotes a wrongful act done intentionally, or without just cause or excuse. It was either express or implied by the common law. Express malice was defined to be where one person kills another with a sedate, deliberate mind and formed design; such formed design may be evidenced by external circumstances, discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm; and malice was implied at common law from any deliberate cruel act committed by one person against another, however sudden; thus, where a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause;³ but implied malice, constituting killing, without an intention to kill, murder, is not recognized in our law.⁴ The intention to take life is what, under our statute,

¹ Laws 1862, ch. 197, § 5.

² *McDamil v. State*, 8 Smed. & Mar., 401.

³ Whar. on Hom., 38; 1 Hale, 451; 4 Bla. Com., 451-200; 1 East. P. C., ch. 5, § 2.

⁴ *Peo. v. Austin*, 1 Park., 154.

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constitutes the principal distinction between murder and manslaughter.¹

It is not necessary to show that the prisoner had any enmity to the deceased; nor will absence of proof of ill will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable cause.²

It is settled, by high authority, that the maliciously killing with premeditation and deliberation, is murder, whether the design to effect death was formed on the instant or had previously been entertained.³

In cases of homicide, it is the premeditated design to kill that constitutes murder, and it is sufficient that the design precedes the act. The Court of Appeals have said, in the case before us, the question is not whether a design to take life existed, that has been found by the jury; the question is whether, where there is an intention to kill existing at the instant of striking the blow, is such an intention a premeditated design within the meaning of the statute. The words "premeditated," "aforethought," and "prepenze" possess etymologically the same meaning. They are, in truth, the Latin and Saxon synonyms, expressing a single idea, and possess in law precisely the same force. If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months, it is enough that the intention precedes the act, although that follows instantly.⁴

(b) Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter.⁵

Thus, if A, having malice against B, strikes at and misses him, but kills C, this is murder in A; and if it had been without malice, and under such circumstances, that if B had died, it would have

¹ *Peo. v. Austin*, 1 Park., 154.

² *R. v. Harney*, 2 B. & C., 268.

³ *Peo. v. Austin*, 1 Park., 154.

⁴ *Peo. v. Clark*, 7 N. Y. (3 Seld.), 394.

⁵ *Whar. on Hom.*, 42.

been manslaughter, the killing of C also would have been but manslaughter.¹

(c) It was said at the common law that when an action, unlawful in itself is done with deliberation, and with intention of mischief or great bodily harm, to particular individuals, or of mischief, indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such original intention doth not appear, which is matter of fact, and to be collected from circumstances given in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful.²

Thus, if a person breaking in an unruly horse willfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it was held murder; for how could it be supposed that a person willfully doing an act so manifestly attended with danger, especially if he showed any consciousness of danger himself, should intend any other than mischief to those who might be encountered by him.³

So also it was held that if a man knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, it was murder, on account of previous malice, though not directed against any particular individual, and it is no excuse that the party was bent upon mischief generally.⁴

So also if a man mischievously throw from a roof into a crowded street where passengers are constantly passing and repassing a heavy piece of timber, calculated to produce death on such as it might fall, and death ensue, the offence was murder at the common law.⁵

The intent to do bodily harm to some one out of a number of persons is necessary to constitute the crime of murder under the second subdivision, even where the homicide is effected by an act

¹ 1 Hale, 379; Fost., 261; 1 Hawk., ch. 31, § 542.

² Wh. C. L. 367; 1 Russ. on C., 539; Foster, 261.

³ 1 Hale, 476; 4 Bla. Com., 200; 1 East. P. C., 231.

⁴ 1 Hale, 475; 3 Inst., 57; 1 East. P. C., 231.

⁵ Whar. on Hom., 45.

immediately dangerous to others, evincing a depraved mind regardless of human life.¹

The second subdivision embraces those cases only where the act resulting in death is such as to imperil indiscriminately the lives of many persons, without being aimed at any one in particular, and therefore does not include a case of killing without premeditated design to effect death, though perpetrated by such acts as were imminently dangerous to the person killed, and evinced a depraved mind, regardless of the life of the deceased.²

Where, on a trial for murder, it appeared that the prisoner and the deceased had been engaged in a fight or scuffle in the public highway, and the prisoner, after knocking down the deceased, took from the stone wall a large stone, and, with both hands, threw it upon the head of the deceased so as to break in his skull and cause his death, and the presiding judge charged the jury that if they believed the deceased came to his death by a blow from the stone thrown against him, the case was capable of being regarded as a case of murder under the second subdivision of the section defining murder; the charge was held to be erroneous, and a new trial was granted. Where the facts of the case bring it within any of the degrees of manslaughter it cannot fall within any definition of murder, and where death is feloniously caused in a cruel and unusual manner, and in the heat of passion, the character of the crime depends on the intent; if done without a design to effect death, it is manslaughter in the second degree; if done with premeditated design, it is murder under the first subdivision of the section defining murder. But if done in the heat of passion, it cannot, whatever may have been the design, be classed under the second subdivision of the section defining murder.³

(d) An offence which is liable to be punished either by imprisonment in a State prison, or by a less punishment, in the discretion of the court, is a felony, and a homicide perpetrated by a person while engaged in the commission of such an offence, is murder, within the above provision of the statute.⁴

At the common law, if the act on which death ensued, be

¹ *Peo. v. Sheriff, &c.*, 1 Park., 659.

² *Darry v. Peo.*, 10 N. Y. (6 Seld.), 120.

³ *Peo. v. Johnson*, 1 Park., 291. Vide *Darry v. Peo.*, 10 N. Y., 120.

⁴ *Peo. v. Van Steenburgh*, 1 Park., 39.

malum in se, it was murder or manslaughter, according to the circumstances. If done in prosecution of a felonious intent, but death ensued, against or beside the intent of the party, it was murder; but if the intent went no further than to commit a bare trespass, it was merely manslaughter.¹

Thus, where A shot at the of poultry of B, and, by accident, killed B himself, if his intent were to steal the poultry, which must be collected from the circumstances, it was murder, by reason of that felonious intent; but if it were done wantonly and without that intent, it will be merely manslaughter.²

(e) At the common law, the killing of a master by his servant and of a husband by his wife were known as petit treason. Our statute declares that the killing of a master by his servant, or of a husband by his wife, shall not be deemed any other or higher offence than if committed by any other person.³

(f) Every inhabitant or resident of this State who shall, by previous appointment or engagement, fight a duel without the jurisdiction of this State, and in so doing shall inflict a wound upon his antagonist or any other person, whereof the person thus injured shall die in this State, and every second engaged in such duel, shall be deemed guilty of murder within this State, and may be indicted, tried and convicted in the county where such death shall happen.

Every person indicted under the provisions of the above section may plead a former conviction or acquittal for the same offence in another State or country, and if such plea be admitted it shall be a bar to any other or further proceeding against such person for the same offence within this State.⁴

Justifiable Homicide.

Mr. WHARTON, in his work upon homicide, says that justifiable homicide is that which is committed either—

1st. By unavoidable necessity, without any will, intention or desire, or any inadvertance or negligence in the party killing, and therefore without blame, such as by an officer executing a criminal

¹ Wh. on H., 46.

² Id.; 1 Hale, 475; 3 Inst., 56.

³ 2 R. S., 657, § 8.

⁴ Id., §§ 6, 7.

pursuant to the death warrant and in strict conformity to the law in every particular.

2d. For the advancement of public justice, as where an officer in the due execution of his office kills a person who assaults and resists him; or where a private person or officer attempts to arrest a man charged with felony and is resisted, and in the endeavor to take him kills him; or if a felon flee from justice and in the pursuit he be killed, where he cannot be otherwise taken; or if there be a riot or a rebellious assembly, and the officers or their assistants in dispersing the mob kill some of them, where the riot cannot be otherwise suppressed; or if prisoners in jail or going to jail assault or resist the officers while in the necessary discharge of their duty, and the officers or their aids, in repelling force by force, kill the party resisting; or thirdly, for the prevention of any atrocious crime attempted to be committed by force, such as murder, robbery, house-breaking in the night time, rape, mayhem or any other act of felony against the person.¹

The Revised Statutes of this State, in the article upon homicide, declare that homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either,

1st. In obedience to any judgment of a competent court; or,

2d. When necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty; or,

3d. When necessarily committed in retaking felons who have been rescued or who have escaped; or

4th. When necessarily committed in arresting felons fleeing from justice.²

Homicide is also justifiable when committed by any person in either of the following cases:

1st. When resisting any attempt to murder such person or to commit any felony upon him or her, or upon or in any dwelling house in which such person shall be; or,

2d. When committed in the lawful defence of such person or of his or her husband, wife, parent, child, master, mistress or servant, when there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury,

¹ Whar. on Hom., 37.

² 2 R. S., 660, § 2.

and there shall be imminent danger of such design being accomplished; or,

3d. When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.¹

(a) Where homicide is committed in obedience to a judgment of a competent court, as by the sheriff in obedience to a writ of execution, it is of course justifiable; but the judgment and sentence must be strictly followed: thus, where the judgment is to be hanged, the felon should not be beheaded.²

Amongst the acts of unavoidable necessity, may be classed the execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity and even of public duty, and therefore not only justifiable, but commendable where the law requires them.³

(b) The rule was held at the common law that where a person was indicted for a felony, and would not suffer himself to be arrested by an officer having a warrant for that purpose, it was held that the officer might lawfully kill him, if he could not otherwise be taken, though such person were innocent, and though, in truth, no felony had been committed.⁴

And in civil cases the resistance will justify the officer in proceeding to the last extremity. So, that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back, and if the party making resistance is unavoidably killed in the struggle, the homicide is justifiable.⁵

Jailors and their officers are under the same special protection as other ministers of justice; and if, therefore, in the necessary discharge of their duty they meet with resistance, whether, from prisoners in civil or criminal suits, or from others in behalf of

¹ 2 R. S., 660, § 3.

² 1 Hale, 433, 454, 466-501; 2 Hale, 411; 3 Inst., 52-211; 4 Bla. Com., 179.

³ Fost., 267; 1 Hale, 496, 502; 4 Bla. Com., 178.

⁴ 1 Hawk. P. C., ch. 28, § 12.

⁵ 1 Hale, 494.

such prisoners, they are not obliged to retreat as far as they can with safety, but may fully and without retreating, repel force by force, and if the party so resisting happen to be killed, this on the part of the jailor or his officer, or any person coming in aid of him, was at the common law justifiable homicide.¹

As a general principle, officers of the law, when their authority to arrest or imprison is resisted, will be justified in opposing force to force if death should be the consequence;² yet they ought not to come to extremities upon every slight interruption without a reasonable necessity.³ And if they should kill where no resistance is made, it will be murder, and the same rule will exist if they should kill the party after the resistance is over, and the necessity has ceased, provided sufficient time has elapsed for the blood to have cooled,⁴ and at the least it will be manslaughter.⁵

So long as a party liable to arrest endeavors peaceably to avoid it, he may not be killed; but whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him, he may be killed, and the act will be justifiable.⁶

Mr. WHARTON, in the discussion of this subject, in his work upon homicide, divides the cases which have arisen thereunder into two classes where the homicide is occasioned by officers in effecting arrests in civil and in criminal cases, and states that in civil suits, if the party against whom the process was issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer, not being able to overtake him, make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it has been said that it will amount to murder;⁷ but this is an extreme case, as the same authorities inform us that if the officer, in the heat of the pursuit and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount

¹ Fost., 321; 1 Hale, 481, 496.

² 4 Blac. Com., 180.

³ 1 East. P. C., 297.

⁴ 1 Hale, 481; Fost., 291 Whar. on Hom., 48.

⁵ 1 East. P. C., 525.

⁶ Whar. on Hom., 50; State v. Anderson, 1 Hill S. C. R., 327.

⁷ 1 Hale, 481; Fost., 291.

to more than manslaughter,¹ if, in some cases, even to that offence. But it will be observed that, by our statute, such homicide is justifiable when necessarily committed by public officers and those acting by their command in their aid and assistance, in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty.

In examining the cases of justifiable homicide by officers in making arrests in criminal cases, it will be seen that a distinction exists between cases of misdemeanor and felony. In the former (with the exception, however, of some flagrant misdemeanors), it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him, and, generally speaking, it will be murder; but under circumstances it may amount only to manslaughter, if it appear that death was not intended.²

Where a felony has been committed, or a dangerous wound given, and the party flees from justice, he may be killed in the pursuit if he cannot otherwise be overtaken; and the same rule holds if a felon, after arrest, break away as he is being carried to jail and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not.³ The slayer, in such cases, must not only show that a felony was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest.⁴

Upon the principle that a person cannot be killed in order to secure his arrest for a misdemeanor, it was held that it is no excuse for killing a man that he was out at night as a ghost, dressed in white, for the purpose of alarming the neighborhood, though he could not otherwise be taken.⁵

Although an officer must not kill for an escape where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for

¹ R. v. Tranter, Stra., 499; Whar. on Hom., 48.

² Whar. on Hom., 49; 1 East. P. C., 302.

³ Whar. on Hom., 50; 1 Hale, 481; Fost., 27; 1 Russ. on Cr., 533.

⁴ Wh. on Hom., 50; 2 Dev., 58.

⁵ 1 East., P. C., 302.

believing his life to be in peril, he may justify killing the party.¹

An officer who makes an arrest out of his proper district, or without any warrant or authority, and purposely kills the party for not submitting to such arrest, will, generally speaking, be guilty of murder in all cases where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent.²

An arrest not unlawful in itself may be performed in a manner so criminal and improper or by an authority so defective as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder; and as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.³

Where no process has been issued, a homicide can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take life in order to arrest or detain the felon; and it is no defence to an officer in such a case to show that he had reasonable ground to believe that the deceased would otherwise accomplish an escape.⁴

(c) This class of justifiable homicides is what was known at the common law as *se defendendo*, or in self defence, and was committed in defence of a man's person upon some sudden affray, considered by the law as in some measure blamable and barely excusable.⁵ The rule at the common law was stated to be that when a man is assaulted in the course of a sudden brawl or quarrel, he may in some cases protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence; but in order to entitle himself to this plea he must make it appear, first, that before a mortal stroke was given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death.⁶ Or in the language of another writer, "If a person engaged in a

¹ Whar. on Hom., 53; Forster's Case, 1 Lewin, 187; 1 Russ. on Cr., 643.

² 1 East. P. C., 312; Whar. on Hom., 52.

³ Whar. on Hom., 52; 1 East. P. C., 297; 1 Hale, 481-489, 494; 2 Hale, 84; 1 Ventr., 216.

⁴ Conraddy v. Peo., 5 Park., 234.

⁵ Fost., 273.

⁶ 1 East. P. C., ch. 5, § 51.

sudden affray quit the combat before he has inflicted a mortal wound, and retreat and fly as far as he can with safety, and then urged by mere necessity, kill his adversary for the preservation of his own life, the homicide is excusable."¹

At the common law it was held, that in order to justify the killing, the bare fear of danger or great bodily harm, unaccompanied by any overt act indicating a present intention to kill or injure, would not warrant a party in killing another.² But in the case of *T. O. Selfridge*,³ the following principles were laid down:

First.—That a man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as the retreating as far as he can, or disabling his adversary without killing, if it be in his power.

Second.—When the attack upon him is so sudden, fierce and violent as that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

Third.—When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

The Court of Appeals in this State have stated the rule to be that, one who is without fault himself, when attacked by another, may kill his assailant if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent, that such design will be accomplished, although it may afterwards turn out that the appearances were false, and there was in fact no such design, nor any danger that it would be accomplished. But this principle will not justify returning blows with a dangerous weapon when he is struck with the naked hand, and there is no reason to

¹ 1 Arch. Cr. Pr., 224; Fost., 276; 1 Hale, 481, 483; 1 Hawk., ch. 29, §§ 13, 14.

² 1 East. Cr. L., 271-272; 1 Hale, 484.

³ Appendix to Whar. on Hom., Boston, pamph.

apprehend a design to do him great bodily harm. Nor will it justify homicide when the combat can be avoided, or where, after it is commenced, the party can withdraw from it in safety before he kills his adversary; for after a conflict has commenced, he must not only quit it, if he can do so in safety, before he kills his adversary, but if his adversary try to escape, he must not pursue and give him fatal blows with a deadly weapon.¹

In another case, the Dutchess oyer and terminer, held that to justify the taking of life in self-defence, it is necessary that the prisoner himself should have been attacked, that he should have had reasonable ground to suppose that the object of the attack was to kill him, or do him great bodily harm; that he should have been unable to withdraw himself from such imminent danger, and therefore should have been compelled to kill his assailant to protect himself against his attack. A person is not responsible for a mistake which he makes in self-defence, in supposing a deadly design which does not exist; but he must be actually assailed, and he must show reasonable ground for supposing that his only recourse was to kill his assailant. To a certain extent, a person must be his own judge in such a case; but if he act honestly, and upon reasonable ground, he will not be held accountable for a mistake made under such excitement, and the great apparent personal danger to himself.²

Whether a homicide is justifiable under the statute, is to be determined by the jury from their conviction, whether there was reasonable ground for the prisoner to apprehend great personal injury, and not from the circumstances that the prisoner did, in fact, entertain such apprehension.³

(d) Another class of justifiable homicide by our statute is what was known to the common law as *se et sua defendendo*, which was said to be, if a person by violence or surprise, attempt to commit a felony upon the person, habitation or property of another, the latter might repel force by force, and, if in the conflict, he happen to kill the offender, the homicide is justifiable.⁴

At the common law also it was the rule that under the excuse of self defence the principal civil and natural relations are com-

¹ *Shorter v. Peo.*, 2 N. Y. (2 Com.), 193; *Uhl v. Peo.*, 5 Park., 410.

² *Peo. v. Cole*, 4 Park., 35.

³ *Peo. v. Austin*, 1 Park., 154.

⁴ *Fost.*, 273.

prehended; therefore master and servant, parent and child, husband and wife killing an assailant in the necessary defence of each other respectfully, are excused, the act of the relation assisting being construed the same as the act of the party himself.¹

For if a man attempt to rob or murder another, the latter may repel force by force, and even his servant attendant upon him, or any other person present, may interpose to prevent the intended offence, and if the party attacking be killed by either the party attacked or him who interposes, the homicide is justifiable.² And this rule extends to the case of master and servant, husband and wife, parent and child killing in defence of each other respectively.³ So a woman may lawfully kill in defence of her chastity if a man attempt to commit a rape upon her.⁴ So if an attempt be made to commit arson or burglary in the habitation, the owner or any part of his family, or even a lodger, may lawfully kill the assailants to prevent the mischief intended.⁵

As by our statute the homicide, in order to be justifiable, must be in resisting a felony, so at the common law a man could not thus justify homicide to prevent a mere trespass or any offence without force.⁶

When it is said that a man may rightfully use as much force as is necessary for the protection of his person or his property, it should be recollected that this rule is subject to the most important modification that he shall not, except in extreme cases, endanger human life or great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or even wrong that may rightly be redressed, by extreme remedies. There is a wanton disregard of social duty in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong, which the law abhors. You may not kill because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. It is therefore said

¹ 1 Hale, 484; 4 Blac., Com., 186.

² Fost., 274; 1 Hale, 481-484; 1 Hawk., ch. 28, §§ 21, 22; Id., ch. 29, § 16.

³ 1 Hale, 484.

⁴ Fost., 274; 1 Hale, 485.

⁵ Fost., 274.

⁶ 1 Hawk., ch. 28, § 23; Cro. Car., 537; 1 Hale, 445, 485-488; Fost., 291.

that if one deliberately kills another to prevent a mere trespass on his property, whether the trespass could or could not otherwise be prevented, he is guilty of murder.¹

(e) In the case of a riot or rebellious assembly, the peace officers and their assistants endeavoring to disperse the mob, were justified at common law in proceeding to the last extremity, in case the riot could not be otherwise suppressed.² And one of the sections of the statute makes the homicide justifiable when committed by public officers in the discharge of their legal duty, but the third subdivision makes the homicide also justifiable when necessarily committed by any person in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing a riot, or in lawfully keeping and preserving the peace.

It was said at the common law that perhaps the killing of dangerous rioters might be justified by any private persons who could not otherwise suppress them or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace.³

In a case of a mere affray or beating with fists, it cannot be necessary for a third person to resort to fire arms, or take life in any case for the purpose of protecting one combatant from being injured by the other, and if life be unnecessarily taken by a third person interfering between two combatants for the purpose of preserving the peace, in protecting one against the other, the offence is manslaughter.⁴

Excusable Homicide.

It is remarked that in cases of justifiable homicide, the slayer is in no kind of fault whatever, not even in the minutest degree, and is to be therefore totally acquitted and discharged with commendation rather than blame; but that such is not quite the case in excusable homicide, the very name whereof imports some fault, some error, or omission, so trivial, however, that the law

¹ Com. v. Drew, 4 Mass., 391.

² 1 Hale, 53, 494, 495.

³ 1 Hawk. P. C., ch. 28, § 14; Fost., 272.

⁴ Peo. v. Colc, 4 Park., 35.

excuses it from the guilt of felony, though in strictness, it judges it deserving of some little degree of punishment.¹

By the Revised Statutes of this State, there are two sections which designate the cases in which homicide is declared to be excusable:

1st. By accident and misfortune in lawfully convicting a child or servant, or in doing any other act by lawful means with usual and ordinary caution, and without any unlawful intent.²

This is what was known to the common law, as homicide by accident, or *per infortuniam* (sometimes, though improperly called chance medley), and is where a man doing a lawful act without intention of doing bodily harm to any one, and using proper caution to prevent danger, unfortunately happens to kill another.³ It was also sometimes called homicide by mis-adventure.

(a) The act must be lawful which the party is doing at the time of the accident. As where a laborer was at work with a hatchet, and the head flew off and killed a person standing by, this was excusable, as being homicide by accident or mis-adventure.⁴ But if the act be unlawful, that is to say *malum in se*, the homicide will be murder or manslaughter, according to the circumstances: if it be felony, the homicide is murder; if a misdemeanor, manslaughter.⁵ The cases where a person kills another without the design to effect death, while engaged in the commission of a collateral felony or misdemeanor, will be found spoken of in another place.

(b) The act must not only be lawful but it must be done without any unlawful intent.⁶

(c) The act must not only be lawful and innocent, but it must be done in a proper manner and with due caution to prevent mischief.⁷ Thus, it was said at the common law that parents, masters, and other persons having authority in *foro domestico*, may give reasonable correction to those under their care, and if death ensue without their fault, it will be no more than accidental

¹ 4 Black. Com., 181.

² 2 R. S., 666, § 4.

³ Fost., 258; 1 Hawk. P. C., ch. 29, § 1; 1 Arch. Cr. Pr., 216.

⁴ 1 Hawk., ch. 29, § 2.

⁵ Fost., 258.

⁶ Fost., 258.

⁷ Id., 262.

death.¹ But if the correction exceed the bounds of due moderation, either in the measure of it or in the instrument made use of for the purpose, it is no longer excusable homicide.²

As to the usual and ordinary caution mentioned by the statute, it should be carefully observed by all persons following their usual and lawful occupations, particularly occupations from which danger may arise.³

2*d.* By accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken and without any dangerous weapon being used, and not done in a cruel and unusual manner.⁴

The general rule at common law was that, whenever death ensued from the sudden transport of passion or heat of blood, upon a reasonable provocation, it was considered as solely imputable to human infirmity, and the offence was manslaughter; for it was said that no provocation would justify a man in killing another, nor would it excuse him; and whether the provocation be by words or acts, and whether slight or great, if the parties come to blows—no undue advantage being taken on either side—and death ensued, it was manslaughter.⁵ But by our statute, where such killing is by accident or misfortune, and not done either with a dangerous weapon, or in a cruel or unusual manner, it is excusable; but if a dangerous weapon is used, or if the killing is done in a cruel or unusual manner, it becomes manslaughter.

This gradation of homicide is what at the common law was termed "chance medley," and was said strictly to be where death ensues from a combat between the parties upon a sudden quarrel, and it was frequently confounded with misadventure or accident.⁶ Homicide, by "chance medley" at the common law, was said to border very nearly upon manslaughter, and that in fact and experience the boundaries were, in some cases, scarcely perceivable, though in consideration of law they have been fixed.⁷ The

¹ Fost., 262.

² *Id.*

³ 1 Arch. Cr. Pr., 219.

⁴ 2 R. S., 666, § 4.

⁵ Fost., 295-290; 1 Hale, 456; 1 Hawk., ch. 31, §§ 33, 34.

⁶ 1 East. P. C., 221.

⁷ Fost., 276.

true criterion between them at common law was stated to be this: when both parties are actually combatting at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or, having begun, endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, it was said to be homicide excusable by self defence.¹

The intentional killing of a human being without provocation, and not in sudden combat, is murder, although done in the heat of passion. Where one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of defence does not arise until he has done everything in his power to avoid its necessity. Where, after a mutual combat has been for the moment terminated, and the fatal blow is then struck, the question to be determined is whether there had been sufficient time for the excited passion of the prisoner to cool, and not whether in point of fact he did remain in a state of anger.²

The statute declaring a homicide to be excusable when committed upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner, is not applicable to a case where the deceased was killed by the prisoner in a fight with fists, and in which the fight was arranged by the prisoner or his friends with his adversary some hours before the fight took place.³

As to what is meant by the phrase "heat of passion," see the section upon manslaughter in the third degree.

Manslaughter.

Manslaughter, at common law, is defined to be the unlawful and felonious killing of another without any malice, either express or implied,⁴ and was of two kinds:

1st. Voluntary manslaughter, which is the unlawful killing of another without malice, on sudden quarrel or in the heat of passion.

¹ 4 Blac. Com., 184.

² *Peo. v. Sullivan*, 7 N. Y. (3 Seld.), 397.

³ *Peo. v. Tannan*, 4 Park., 514.

⁴ 1 Hale, 449; 1 Hawk., ch. 30, § 3; *Selfridge's Trial*, 158.

Thus, if a man be greatly provoked by any gross indignity, and immediately killed his aggressor, it was voluntary manslaughter, and not excusable homicide, not being *se defendendo*; neither was it murder, for there was no previous malice.¹

2d. Involuntary manslaughter, where a man doing an unlawful act, not amounting to felony, by accident killed another. It differed from homicide, excusable by mis-adventure in this, that mis-adventure always happened in the prosecution of a lawful act; but this species of manslaughter, in the prosecution of an unlawful one. Thus, where a prisoner did an act lawful in itself, but in an unlawful manner, this excepted the killing from homicide excusable *per infortuniam*, and made it involuntary manslaughter.²

Manslaughter, by our statutes, is divided into four degrees, which will be found mentioned below.

A. Manslaughter, First Degree.—(a) The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged:

1. In the perpetration of any crime or misdemeanor not amounting to felony; or,

2. In an attempt to perpetrate any such crime or misdemeanor.

In cases where such killing would be murder at the common law, it is manslaughter in the first degree.³

The cases falling under this head, with but few exceptions, are those where homicides are committed in the prosecution of unlawful assemblages. At the common law, where an unlawful assemblage took place, with the intention to redress a private or social grievance, and to incidentally resist process, merely so far as may be necessary to effect the private or social end, the offence amounted not to the dignity of treason; and if, during its commission, life is lost, the offender must be tried for murder alone.⁴

“Where divers persons,” says HAWKINS, “resolve generally to resist all opposers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing happen to kill a man, they are all guilty of murder, for they must, at their peril, abide the event of their actions, who unlawfully engage in such bold dis-

¹ Whar. on Hom., 35.

² Id., 36.

³ 2 R. S., 661, § 6.

⁴ Wh. on Hom., 344.

turbances of the public peace in opposition to, and defiance of, the justice of the nation."¹

Stragglers and idlers caught up by a mob in its progress, become involved in its guilt, to the very extent that they are aware of its general purpose; any other principle would not only secure indemnity for such crimes, but would destroy all efficiency in government.

It is true that a man who drops mechanically into a crowd passing along the street, is not responsible for a murder committed by one of the number, if he is entirely ignorant that they constitute an unlawful assembly; but that ignorance cannot exist after an order for dispersion is given by the lawful authorities. The man who, after such a moment remains a passive spectator, is as responsible as he who takes an active part.²

"Hot blood" alone is of no effect unless it is attended with sufficient provoking causes; such causes, when taken in connection with riotous homicide are comparatively limited. The authorities all agree that if there is time to cool, taking in view all the circumstances of the case, hot blood can no longer be set up. Where an unlawful assembly resorts to the use of deadly weapons, and death ensues to innocent third parties, it seems that such a homicide is murder at the common law, supposing the guilt of the offender is not extenuated by such a state of hot blood as would reduce the grade to manslaughter.³

It will be observed that the difference between the common law and our statute in regard to the above mentioned grade of homicide is this: That while the common law considered the killing of a human being murder, although perpetrated without a design to effect death, if the slayer was at the time engaged either in committing a felony or in the commission of a misdemeanor, which was in itself calculated to produce great bodily harm, the offence was murder; but by our statute, the killing without a design to effect death, where the slayer is engaged in the perpetration or attempt to perpetrate any collateral misdemeanor, is manslaughter in the first degree.⁴

¹ 1 Hawk. P. C., ch. 31, § 51; 1 Hale, 439; 4 Black. Com., 200; 1 East. P. C., 257.

² Whar. on Hom., 347.

³ Whar. on Hom., 353; Hare's Case. Phila. Riots.

⁴ Foster, 261; 1 Hawk., ch. 29, § 10.

On the same principle that parties engaged in a duel are guilty of murder if death ensue, so persons engaged in prize fighting, with the same result, are guilty of manslaughter. The difference between the cases is simply that of intent. In the first instance there is an intent to take life; in the second, an intent merely to do an unlawful act not amounting to felony.¹

Death caused by the burning of a steamboat, which results from the making of excessive fires for the purpose of creating steam in order to outrace another steamboat, was held to be manslaughter in the first degree; the creating an undue or unsafe quantity of steam for the purpose of excelling another boat in speed being a misdemeanor under our statute.²

(b) The willful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, is also manslaughter in the first degree.³

At the common law, an infant in the womb, although alive, could not be the subject of homicide unless where, after being injured in the womb, it was afterwards born alive but died of the injuries it before received;⁴ and where the killing of an unborn quick child was occasioned by striking the mother, it was held at the common law only a misdemeanor.

As to what is meant by a quick child see the section entitled "Abortion."⁵

(c) Every person deliberately assisting another in the commission of self-murder, is also guilty of manslaughter in the first degree.⁶

At the common law, if one persuaded another to kill himself, the adviser was guilty of murder, and if the party took poison himself by the persuasion of another in the absence of the persuader, yet it was a killing by the persuader;⁷ but the section or the statute above quoted has reduced this offence from the grade of murder to that of manslaughter in the first degree.

¹ Whar. on Hom., 147, *et seq.*; R. v. Murphy, 6 C. & P., 103.

² Peo. v. Shff., &c., 1 Park., 659.

³ 2 R. S., 661, § 8.

⁴ 2 Hawk., ch. 31, § 16; R. v. West., 2 C. & K., 784.

⁵ Ante, p. 508.

⁶ 2 R. S., 661, § 7.

⁷ 1 Hawk. P. C., 27, § 6. Vide Com. v. Bowen, 13 Mass., 356.

(B) *Manslaughter, Second Degree.*—(a) Every person who shall administer to any woman pregnant with quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or such mother be thereby produced, be deemed guilty of manslaughter in the second degree.¹

And where an indictment charged that the accused administered to a pregnant woman some drug, and in another count that she employed some instrument, with intent thereby to procure a miscarriage of the patient, which is all that the act of 1845, to prevent the procurement of an abortion, requires to constitute a misdemeanor, and then went on to allege that the patient was quick with child, and that the death of such child was effected, and characterized the act of the defendant as felonious, it was held that these allegations did not contradict the charge for a misdemeanor, nor did they contain a valid charge for felony which would merge the misdemeanor, because there was no allegation of an intent to destroy the child.²

The essential part of the definition of this offence is the intent to destroy the child. The statute, in relation to the misdemeanor for administering to a pregnant woman some drug, or employing some instrument, is, "where the intent is to thereby procure a miscarriage of such patient."³

(b) The killing of a human being without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, is also manslaughter in the second degree.⁴

The same remarks which appear under the first subdivision of manslaughter in the third degree, will in a measure apply to this grade of the offence. The terms "cruel and unusual manner" contained in this section are excluded from that relating to

¹ 2 R. S., 661, § 9. Vide Abortion, ante, p. 508; Laws 1846, ch. 22, § 1.

² Peo. v. Lohman, 2 Park., 216.

³ Peo. v. Lohman, 2 Park., 220. Vide also Abortion, ante, p. 508; and miscarriage as a misdemeanor, post, p. ; 2 Barb., 216; 1 Park., 424.

⁴ 2 R. S., 661, § 10.

excusable homicide, in the same manner that the term "dangerous weapon," used in the first subdivision of manslaughter in the third degree, is also excluded from the definition of excusable homicide.

(c) Every person who shall unnecessarily kill another, either—1st. While resisting an attempt by such other person to commit any felony or to do any other unlawful act; or, 2d. After such attempt shall have failed, is guilty of manslaughter in the second degree.¹

If the killing were actually necessary, the homicide, as we have seen, would have been justifiable. Although a man may have the right to resist the commission of a felony, he should not, except in extreme cases, endanger human life.

C. Manslaughter, Third Degree.—(a) The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is by statute declared to be justifiable or excusable, is manslaughter in the third degree.²

This offence is nearly allied to the second subdivision of excusable homicides, or what was known to the common law as "chance-medley," there being excepted from that class of excusable homicides, cases like the present, where the death was occasioned by a dangerous weapon, for although the law, considering the excitement of provoked passion in a casual affray, and the want of design to effect death upon the part of the slayer, as in cases of excusable homicide, will not lend its aid to the use of dangerous weapons, or countenance the killing where the death is perpetrated by such means.

The same distinction between excusable homicide, or that division of it known to the common law as "chance-medley," and manslaughter in the third degree, under the above subdivision, which exists under our statute, seemed to exist also at the common law, or rather there was a diversity of opinion concerning it. Thus, where death ensued in the case of innocent sports or recreations, it fell within excusable homicide;³ but if dangerous weapons were

¹ 2 R. S., 661, § 11.

² Id., § 12.

³ Fost., 250; 1 East. P. C., 268.

used, in such sports and one of the parties were killed, Lord HALE considered it manslaughter.¹

If in a paroxysm of unprovoked anger, one kill another, or instigated by a brutal passion, not excited by such other, the assailant kills his victim, it is not that heat of passion which forms one of the statutory elements of manslaughter. If the intention to kill exists, it is not the less murder that the killing occurred under the excitement of unprovoked and brutal passion.

The heat of passion mentioned in the statutory definition of manslaughter, affords the intended protection to the accused, whether it was produced by acts or words, if the provocation was such as was naturally calculated to produce it, for the law respecting the infirmities of our nature, attaches a less degree of criminality to acts of violence perpetrated under an excitement provoked by the assailed. The passions may be heated as effectually by words as by acts, and an assault may be provoked oftentimes, as readily by the former, as by the latter. In cases of assault of the person, it has always been held that provocation by words, has gone far to mitigate the legal wrong. It cannot be that the accused must always show a combat, and a sufficient provocation. It is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and it matters not whether this state is produced by acts or words, if either the one or the other are naturally calculated to produce it.²

Where the prisoner was the aggressor, and commenced the attack, and made use of such weapons, etc., as were calculated to endanger life, it was held that malice would be inferred, and that the fact that the prisoner was in the heat of passion, would not mitigate the offence into a lesser crime.³

(b) The involuntary killing of a human being by the act, procurement or culpable negligence of another while such other person is engaged in the commission of a trespass or other injury to private rights or property, or engaged in an intent to commit such injury, is manslaughter in the third degree.⁴

It has been previously seen that in order to make the homicide excusable, where the killing was by accident or misadventure,

¹ 1 Hale P. C., 472.

² Wilson v. Peo., 4 Park., 619, *et seq.*

³ Peo. v. Vinegar, 2 Park., 24.

⁴ 2 R. S., 662, § 13.

the act in which the slayer was engaged should have been a lawful act. If he, at the time of the killing, was engaged in the commission of a collateral felony the killing was murder, and if he were at such time engaged in the perpetration of a collateral misdemeanor it was manslaughter in the first degree; and in this instance, although the slayer was not engaged in any indictable offence, but in a mere trespass or injury to private rights or property, or in an attempt to commit such injury, he is guilty of manslaughter in the third degree. At the common law this offence was manslaughter:¹ as where a man whipped a horse on which another was riding, whereupon the horse sprang out and ran over a child and killed him.²

(c). If the owner of a mischievous animal, knowing its propensities, willfully suffer it to go at large, or shall keep it without ordinary care, and such animal, while so at large or not confined, shall kill any human being, who shall have taken all the precautions which the circumstances may permit to avoid such animal, such owner is guilty of manslaughter in the third degree.³

At the common law it was held that if a man have a wild or unruly beast, which he knows would hurt persons, and he lets it loose, either with a design that it would injure some person, or even to frighten people and make sport, and it kill a man, the man who let it loose would be guilty of homicide.⁴

(d) Any person navigating any boat or vessel for gain who shall willfully or negligently receive so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, is also guilty of manslaughter in the third degree.⁵

(e) If the captain or any other person having charge of any steamboat used for the conveyance of passengers, or if the engineer or other person having charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an

¹ Fost., 258-259.

² 1 Hawk., ch. 29, § 3.

³ 2 R. S., 662, § 14.

⁴ 1 Hale, 431.

⁵ 2 R. S., 662, § 15.

undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus, or machinery connected therewith, by which bursting or breaking any person shall be killed, is also guilty of manslaughter in the third degree.¹

(f) If any physician while in a state of intoxication shall, without a design to effect death, administer any poison, drug or medicine, or do any other act to another person which shall produce the death of such other, he is guilty of manslaughter in the third degree.²

The essential ingredient of this grade of manslaughter is the intoxication of the physician. The cases where death occurs from the simple malpractice of the physician, unattended by intoxication, would seem more properly to fall within the fourth degree of manslaughter.

(g) Where the violent explosions of saltpetre or gunpowder at any fire within certain limits in the city of New York, where such saltpetre or gunpowder is stored contrary to the provisions of the statute, shall result in the death of any person or persons, the offender, upon conviction, is to be deemed guilty of manslaughter in the third degree.³

(h) Every agent, engineer, conductor, or other person in the employ of a railroad company or of persons, through whose wrongful act, neglect or default, the death of a person shall have been caused, as mentioned by the statutes, shall be liable to be indicted therefor, and, upon conviction, shall be punished as prescribed by the statute.⁴

D. Manslaughter, Fourth Degree.—The involuntary killing of another by any weapon, or by means neither cruel or unusual, in the heat of passion, in any cases other than such as are by the Revised Statutes declared to be excusable homicide, is manslaughter in the fourth degree.⁵

As before stated, excusable homicide by our statute excluded cases of killing where the death was effected either by a dangerous weapon or in a cruel or unusual manner, and in the subse-

¹ 2 R. S., 662, § 16.

² 2 R. S., 662, § 17.

³ Laws of 1846, ch. 291, p. 387 § 19.

⁴ Laws of 1849, ch. 256, § 2.

⁵ 2 R. S., 662, § 18.

quent definitions of manslaughter we had, first, a killing in the heat of passion in a cruel and unusual manner, but without a design to effect death; and then again we had another grade of manslaughter, where the killing was also in the heat of passion and without a design to effect death, but by a dangerous weapon, thus including in the two classes of cases thus provided for the two classes excepted from the definition of excusable homicide, and we have now a still lower grade of offence where, although the killing is still involuntary and in the heat of passion, yet it is by a weapon, but not a dangerous one, or else by means which are neither cruel or unusual.

Also every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared by the statute to be murder or manslaughter in some other degree, is manslaughter in the fourth degree.¹

The general doctrine which applies to all cases of accidents by negligence in common carriers of travellers, whether by land or by sea, is that if speed be used of such a nature as to prevent escape, or to destroy the capacity of the party employing it in case of a collision, or if there be a positive neglect of that care by which a collision could be avoided, the offending party, if death ensue, is guilty of manslaughter.²

If a person breaking an unruly horse ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it clearly appears to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter,³ though it is said in such case it would be murder if the rider intended to divert himself with the fright of the crowd.⁴

A husband is bound to afford nurture and comfort to his wife, and if she dies from the want of it he is guilty of manslaughter.⁵

And the same general principle applies to the relations of parent and child and master and apprentice.⁶

¹ 2 R. S., 662, § 19.

² Whar. on Hom., 101; U. S. v. Collyer, Blatch. Rep.

³ 1 East. P. C., 231.

⁴ 1 Hawk. P. C., ch. 31, § 68.

⁵ R. v. Plummer, 1 C. & K., 602.

⁶ Whar. on Hom., 123, and cases cited.

Judicial sentiment on the subject of malpractice, by medical attendants, has been characterized by much vacillation.¹ The general rules, as appears from an examination of the cases, is that if any person, whether he be a regular licensed medical man or not, professes to deal with the life and health of the people, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention and assiduity.² And in one case the jury were instructed that if the prisoner had used a medical instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty.³ Carelessness on the part of persons employed in their ordinary business avocations when resulting in death, is manslaughter.⁴

The jury will be directed, however, to acquit, if reasonable care be shown. Thus, where the prisoner was indicted for manslaughter, in having, by negligence, in the manner of slinging a cask, caused the same to fall and kill two females, who were then passing along the causeway. It appeared that there were three modes of slinging casks customary in Liverpool: one by slings passed around each end of the casks, a second, by can hooks, and the third, in the manner in which the prisoner had slung the cask which caused the accident, namely, by a single rope round the centre of the cask. The cask was hoisted up to the fourth story of a warehouse, and on being pulled endwise toward the door, it slipped from the rope as soon as it touched the floor of the room. The judge, in the course of his charge, told the jury that the double slings are undoubtedly the safest mode; but if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him.⁵ Mere wantonness or sport which, however, results in death, makes the offender in like manner guilty; as where such death was occasioned by the throwing of large stones down a mine, and breaking the scaffolding.⁶

Where a man lays poison to kill rats, and another man takes it, and it kills him, if the poison were laid in such a manner and

¹ Whar. on Hom., 131, *et seq.*, and cases cited.

² R. v. Spiller, 5 C. & P., 333.

³ Ferguson's Case, 1 Lew., 181.

⁴ Fost., 262; 1 East., 262; R. v. Carr, 8 C. & P., 163.

⁵ Rigmondon's Case, 1 Lew., 180.

⁶ Fenton's Case, 1 Lew., 179.

place as to be mistaken for food, it is perhaps manslaughter; if otherwise, mis-adventure only.¹

XXV. INCEST.

Persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or shall commit adultery or fornication with each other, are guilty of a felony.²

The following are the marriages which are by statute declared to be incestuous and wholly void, viz.: Marriages between parents and children, including grand parents and grand children, of every degree, ascending and descending; and between brothers and sisters, of the half as well as the whole blood, and this provision extends to illegitimate as well as legitimate children and relatives.³

The statute is only applicable to cases in which the sexual intercourse is by mutual consent; where it is accomplished by force it is punishable only as a rape.⁴

XXVI. KIDNAPPING.

This is an offence of a very serious nature. Its punishment at common law, however, was no more than fine and imprisonment; though, as has been remarked concerning it, the offence is of such primary magnitude that it might well have been substituted upon the roll of capital crimes in the place of many others which are there to be found.⁵ It is an aggravated species of false imprisonment, and all the ingredients in the definition of the latter are necessarily comprehended in the former.⁶

Where there is a forcible abduction, or stealing and carrying away of any person by sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such, his captivity is properly called kidnapping;⁷ but in our statute, in addition to the above circumstances, the secret imprisonment

¹ 1 Hale, 431.

² 2 R. S., 688, § 12.

³ 2 R. S., 139, § 2.

⁴ *Peo. v. Harriden*, 1 Park., 344.

⁵ 1 East. P. C., ch. 9, § 4.

⁶ 4 Black. Com., 219, note; *Rex v. Grey*, 7 Raym., 473; Comb., 10.

⁷ *Hotchkiss St. L.*, p. 711, § 77.

in this State of a person against his will, or the selling of a person as a slave against his will, also fall within the statutory definition of kidnapping. There is also another statute against persons who offend against the laws by selling the services of kidnapped blacks. The following are the statute laws of our State above referred to:

Every person who shall, without lawful authority, forcibly seize and confine any other, or shall inveigle or kidnap any other, with intent either, 1st. To cause such other person to be secretly confined or imprisoned in this State against his will; or, 2d. To cause such other person to be sent out of this State against his will; or, 3d. To cause such person to be sold as a slave or in any way held to service against his will, shall, upon conviction, be punished by imprisonment in a State prison.¹

The offences above prohibited may be tried either in the county in which the same was committed or in any county through which the person so kidnapped or confined shall have been taken while under such confinement.²

Procuring the intoxication of a sailor with the design of getting him on shipboard without his consent, and taking him on board in that condition, is kidnapping under the statute, and is so equally whether the defendant did the acts or any of them in person, or caused them to be done. And when the intent and expectation is that the seaman will be carried out of this State, the offence is complete, though the ship be not in fact destined to leave the State.³

Upon the trial of this offence, the consent of the person so kidnapped or confined, thereto, is not a defence unless it appear satisfactorily to the jury that such consent was not extorted by threats or by duress.⁴

Every person who shall sell or in any manner transfer for any term the services or labor of any black, mulatto or other person of color who shall have been forcibly taken, inveigled or kidnapped from this State to any other State, place or country, is guilty of a felony.⁵

¹ 2 R. S., 664, § 30; Laws 1827, p. 348; Laws 1817, p. 143, § 29.

² Id.; Laws of 1827, p. 348, § 1.

³ Hadden v. Peo., 25 N. Y., 373.

⁴ 2 R. S., 664, § 32.

⁵ Id., 665, § 34.

This offence may be tried in any county in which the person of color so sold or whose services shall have been so transferred shall have been taken, kidnapped or inveigled, or through which he shall have been carried or brought.¹

The last section of the statute does not apply to the sale or transfer made in another State of a black inveigled in this State. If it did it would be repugnant to the provision of the constitution of the United States.²

The kidnapping a person of color is equally an offence whether he is a slave or not.³

XXVII. LARCENY.

Different authors and judges have given definitions of the common law offence of larceny; thus, in *EAST'S Pleas of the Crown*, larceny, at the common law, was defined to be the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.⁴

And in a case reserved for the consideration of the twelve judges, the learned judge who delivered their opinion, said the true meaning of larceny is, the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker.⁵

In a more recent English case, *PARKE, B.*, said the definitions of larceny are none of them complete. *MR. EAST'S* is the most so, but that wants some little explanation. His definition is defective in not stating what the definition of "felonious" in that definition is. It may be explained to mean that there is no color of right or excuse for the act, and the intent must be to deprive the owner, not temporarily, but permanently, of his property.⁶

The commissioners of the code, in their draft of a penal code, submitted to the Legislature of this State, in a note to their definition of larceny, say that four of the crimes affecting property, require to be somewhat carefully distinguished: robbery, larceny,

¹ 2 R. S., 664, § 35.

² *Peo. v. Merrill*, 2 Park., 590.

³ *Thompson's case*, 2 City H. Rec. 120.

⁴ 2 East. P. C., 553.

⁵ *Hammond's Case*, 2 Leach, 1089.

⁶ *R. v. Holloway*, 2 Car. & Kir., 945.

extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners, may be briefly stated, thus: All four include the criminal acquisition of the property of another. In robbery, this is accomplished by means of force or fear, and by overcoming or disregarding the will of the rightful possessor. There is a taking of property from another against his consent. The physical power to resist being overcome by force, or what is equivalent in law, the moral power to refuse being prostrated by fear. In larceny, there is still a taking, but it is accomplished by fraud or stealth; the property is taken not *against* the consent of the owner, but *without* it. In extortion, there is again a taking; now it is *with* the consent of the party injured; but this is a consent induced by threats, or under color of some official right. In embezzlement, there is no taking in the technical sense; that is, no taking from the possession of another; the offender being in possession of the property, in virtue of some trust, which the law deems worthy of special sanction, applies it by fraud or stealth to his own use; thus, extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

ROSCOE, in his criminal evidence (6th ed., page 567), says: It may be remarked that everything in larceny, and the kindred offences of embezzlement and false pretences, depends on a clear appreciation of the difference between *possession* and property.

Possession, in the sense in which it is used in the English law, extends not only to those things of which we have manual prehension, but those which are in our house, on our land, or in the possession of those under our control, as our children, servants, etc.¹

Property is the right to the possession, coupled with an ability to exercise that right. Bearing this in mind, we may safely define larceny, as follows: The wrongful taking *possession* of the goods of another, with the intent to deprive the owner of his *property* in them. It is not necessary to add to this definition the words "without any claim of right by the taker," as that is excluded by the latter branch of the definition relating to the intent. Nor is it necessary to say that the taking must be "against the will of the owner," because that is included in the word "wrongful."

¹ R. v. Wright, Dear. & B. C. C., 481; R. v. Reid, Dear. C. C., 257.

And it is believed that, bearing in mind the latter definition, as given by Mr. Roscoe, and distinguishing between the right of property in chattels by the owner, and the mere possession of them by another, the subtleties of the law, as applied to actual cases of larceny, will be the more readily comprehended, particularly in that class of cases which determine whether there has been a constructive taking of the goods alleged to have been stolen.

How Divided.—BLACKSTONE divides larceny into simple larceny or plain theft, unaccompanied with any atrocious circumstance, and mixed or compound larceny, which includes in it the aggravation of a taking from one's house or person.¹

Larceny is also divided by statute into grand and petit larceny. Grand larceny being where the value of the property stolen exceeds in value twenty-five dollars, or where, though less than twenty-five dollars in value, it is stolen from the person of another; petit larceny is where the property stolen is of the value of less than twenty-five dollars and is not stolen from the person of another.²

The general characteristics of the grades of grand and petit larceny, other than as above stated and except in the manner of their punishment, are the same.

1. *Subjects of Larceny.*

(a) *Of Things Appertaining to the Freehold.*—At the common law the felonious taking and carrying away must be of the personal goods of another; for if they were things real or savor of the reality, larceny at the common law could not be committed of them. Land tenements and hereditaments (either corporeal or incorporeal, could not in their nature be taken and carried away; and of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed at the common law; but the severance of them was merely a trespass which depended on a subtlety in the legal notions of our ancestors.³

It was, however, held at common law that things though they savor of the reality, might become the subjects of larceny by

¹ 4 Black. Com., 229.

² 2 R. S., 679, § 65; Id., 690, § 1, Laws 1862, ch. 374, § 2.

³ 4 Black. Com., 232.

being severed from the freehold; thus, if stones be dug out of a quarry, wood be cut, or fruit be gathered, larceny might be committed of them.¹

But it is provided by our statute that if any person shall sever from the soil of another any produce growing thereon of the value of more than twenty-five dollars, or shall sever from any building, or from any gate, fence, or other railing, or inclosure, any part thereof, or any material of which it is formed, of the like value, and shall take and convert the same to his own use, with intent to steal the same, he shall be deemed guilty of larceny in the same manner and of the same degree as if the articles so taken had been severed at some previous and different time.² Severing and taking away by one act growing crops to an amount less than twenty-five dollars in value is not a criminal offence under the above statute.³

Under an English statute, for stealing things fixed to a building, a cart-shed in a field made of boards, with a door which locked, but the roof was not yet thatched, was held to be a building within the meaning of the act.⁴

(b) *Larceny of Written Instruments*.—Larceny could not at the common law be committed of written instruments, whether they related to real estate or concerned mere choses in action. If they related to real estate the taking of them was considered as merely a trespass and no felony, upon a principle allied to those already mentioned, namely, that they concern the land, or, (in technical language) savor of the realty, are considered as part of it by the law and descend to the heir; and when they concerned mere choses in action, as bonds, bills and notes, they were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value and not imparting any property in the possession of the person from whom they were taken.⁵

Our statutes, however, enact that whoever shall be convicted of having stolen and carried away any record, paper or proceed-

¹ 1 Hale, 510; 3 Inst., 109.

² 2 R. S., 680, § 70.

³ *Comfort v. Fulton*, 13 Abb. Pr. R. 276. See *Malicious Trespass*, post.

⁴ *R. v. Worrall*, 7 C. & P., 516.

⁵ 2 Russ. on Cr., 70; 1 Hale, 510; 3 Inst., 109; 4 Black. Com., 234; 1 Hawk. P. C., ch. 32, § 35; 2 East. P. O., 596-597.

ing of a court of justice, filed or deposited with any clerk or officer of such court, or any paper, document or record, filed or deposited in any public office or with any judicial officer, shall be adjudged guilty of larceny, without reference to the value of the record, paper, document or proceeding so stolen.¹

The Revised Statutes also provide for the punishment of the larceny of other written instruments, bonds, covenants, notes, bills of exchange, draft orders or receipts, or any other evidence of debt, or of any public security issued by the United States, or by this State, or of any instrument whereby any demand, right or obligation shall be created, increased, released, extinguished or diminished, or of tickets in lotteries authorized by the laws of this State, or shares or interests in such tickets, or of railroad passenger tickets.²

Railroad passenger tickets of any railroad company, as well before the same shall be issued to its receivers or other agents for sale as after, and whether endorsed by such receivers or other agents or not, are to be deemed railroad tickets within the statute.³

A written instrument is not the subject of larceny simply because it is genuine in signature and has the form of a valuable obligation or security. It must be really valuable as a security or as the evidence of right, which it never can be unless consummated by a complete execution and delivery of the instrument, and without this the crime cannot be committed.⁴

(c) *The Larceny of Animals, Birds and Fish.*—BLACKSTONE says that larceny cannot be committed of such animals in which there is no property, either absolute or qualified, as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares and conies, in a forest, chase or warren, fish in an open river or pond, or wild fowls at their natural liberty. But if they are reclaimed or confined and may serve for food, it is otherwise at common law, for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed.⁵

Domestic animals of every description, whether beasts or birds,

¹ 2 R. S., 680, § 71.

² 2 R. S., 679, §§ 68, 69; *Id.*, 680, §§ 75, 76, 77.

³ 2 R. S., 680, § 77.

⁴ *Pco. v. Loomis*, 4 Den., 380; *Contra*, 3 Hill, 194.

⁵ 4 Black. Com., 235.

were always the subjects of larceny at common law, such as horses, oxen, sheep, and the like, and ducks, geese, turkeys, peafowls, etc.¹

So larceny may also be committed of their eggs or young ones.²

It was also larceny to steal the produce of any of them, though taken from the living animal. Thus, milking a cow in the pasture and stealing the milk was held larceny by all the judges. So also was pulling the wool from the backs of sheep.³

Where the animals are not domestic, but *feræ naturæ*, larceny may notwithstanding be committed of them if they are fit for the food of man and dead, reclaimed (known to be so) or confined. Thus, if hares or deer be so enclosed in a park that they may be taken at pleasure, and fish in a trunk or net, or it seems in any other enclosed place which is private property, and where they may be taken at any time at the pleasure of the owner, or pheasants or partridges be confined in a mew, or pigeons be shut up in a pigeon house, or swans be marked and pinioned, or (though unmarked) be kept tame in a moat, pond or private river, or if these creatures be dead and in the possession of any one, the taking of them with felonious intent will be larceny.⁴

The stealing a stock of bees was held larceny.⁵

But it has been held that wild bees are not the subject of larceny so long as they remain in the tree where they have lived and are not secure in a hive, notwithstanding the tree is upon the land of an individual and he has confined them in it.⁶

Where pigeons were shut up in their boxes every night, and stolen out of their boxes during the night, it was also held larceny.⁷

In a later case in England, it was held that where pigeons were so tame that they came home at night to roost in boxes after they had been out to feed, they were reclaimed, and the subjects of larceny, though the boxes were not shut up at night.⁸

¹ 1 Hawk. P. C., ch. 33, § 43; 1 Hale, 511.

² Id.

³ 2 East. P. C., 617; 1 Leach, 171.

⁴ 1 Hale, 511; 2 Inst., 109-110; 2 Hawk. P. C., ch. 33, § 41; 4 Blac. Com., 235; 2 East. P. C., 607.

⁵ 2 East., P. C., 607; 2 Blac. Com., 392-393.

⁶ Wallis v. Mease, 3 Binn. R., 546; Cook v. Weatherly, 5 Sm. & Mars., 323.

⁷ 1 Russ. on Cr., 83.

⁸ 4 C. & P., 131.

It was held in Massachusetts that doves are *feræ naturæ* and not the subject of larceny unless they are in the custody of an owner.¹

But a different doctrine prevails with respect to animals *feræ naturæ* which are unreclaimed. As it is considered that no person has a sufficient property in them to support an indictment for larceny, thus larceny cannot be committed of deer, hares or conies in a forest, chose or warren, or fish in an open pond or river, or of wild fowls, when at their natural liberty, or of old pigeons out of their dove house, or even of swans, though marked, if they range out of the royalty.²

But larceny may be committed of the flesh or skins of any of these or other creatures fit for food when they are killed, because they are then reduced to a state in which a right of property in them may be claimed and exercised.³

At common law it was held that there was a class of animals which, though they may be reclaimed, are not such of which larceny can be committed, by reason of the baseness of their nature; some animals which in this country are now usually tame come within the question, as dogs and cats; and others which, though wild by nature, are often reclaimed by art and industry, fell within the same rule, as bears, foxes, apes, monkeys, polecats, ferrets, and the like.⁴

In a recent case in this State the prisoner was indicted and arrested for grand larceny in stealing a dog. The court said, at common law a dog was not the subject of larceny, and not only was it no crime to steal a dog, but a man might secretly take and carry away a whole menagerie and be entirely guiltless. The reason of the rule was, that these animals were of so base a nature that it would not do to make the taking of them a felony; at that time larceny was punishable with death, and it was undoubtedly to get clear of sacrificing a man for a dog or bear that the decision was made and followed in subsequent cases. The court further said, the reason of the law no longer existed, and on that ground alone the rule might cease to be operative, but that the common law had been adopted in this State, and that the court

¹ Com. v. Chace, 9 Pick., 15.

² 1 Hale, 511.

³ 1 Hale, 511; 3 Inst., 110.

⁴ 1 Hale, 511-512; 1 Russ. on Cr., 85; Russ. & Ry., 350; 3 Inst., 109.

did not feel disposed, by judicial legislation, to abrogate any part of it; but held that the common law in this respect has been changed by the Revised Statutes, which recognize dogs as property by subjecting them to taxation, and define larceny so as to cover the taking and carrying away of all kinds of personal property.¹

By statutory enactment in this State the unlawful taking and carrying away the oysters of another, lawfully planted upon the bed of any river, bay, sound, or other waters within the jurisdiction of this State, although not declared larceny, is deemed a misdemeanor, and punishable as such.²

(d) *Other Subjects of Larceny.*—Larceny cannot be committed of things which are not the subject of property, as of a dead body;³ but the taking the boots *animo furandi* from the feet of a man drowned and driven ashore from a wreck, is larceny.⁴

Ice, when put away in an ice-house for domestic use, becomes individual property, so as to be subject of larceny.⁵

Taking away a letter from another which is of no extrinsic value, or imparting any property in possession of the person from whom it was taken, was held not to be larceny.⁶

Property though unlawfully acquired may be the subject of larceny; therefore it will be larceny to take money which the party from whom it is taken obtained by the sale of intoxicating liquors in violation of the laws of the State.⁷

A receipt for the payment of a debt, is the subject of larceny; but stealing a receipt or other instrument from the hands of the party whose act it is, it never having taken effect by delivery, is not larceny; thus, where a debtor procured his creditor to sign a receipt for the debt, and then took it from him with a criminal intent, and without paying the money, it was held that he was not guilty of larceny.⁸

But a different rule was held where bank notes were filled up

¹ *Peo. v. Maloney*, 1 Park. Cr. R., 593. See also *Peo. v. Campbell*, 4 Park. Cr., 386.

² Laws 1866, ch. 753.

³ *Russ. & Ry. C. C.*, 366; 2 T. R., 733.

⁴ *Wanson v. Saywood*, 13 Pick., 402.

⁵ *Ward v. People*, 3 Hill, 395; affirmed 6 Hill, 144.

⁶ *Payne v. The Peo.*, 6 John. R., 103.

⁷ *Com. v. Rourke*, 10 Cush., 397.

⁸ *Peo. v. Loomis*, 4 Den., 380.

and complete, though not yet issued, and remaining in the possession of the bank, which were considered the subjects of larceny.¹ And it was held that, although a simple receipt is not the subject of larceny under the statute, it is otherwise of a receipt for money or property, to be accounted for, or of a promissory note, though payable in specific articles.²

The Revised Statutes of this State define larceny to be the stealing, taking and carrying away the personal property of another (2 R. S., 679, § 65, 690, § 1; 1 Park. Cr. R., 593); and the same chapter (702, § 44), defines personal property to mean goods, chattels, effects, evidences of rights of action, and all written instruments by which any pecuniary obligation, or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, discharged or diminished. There is no term broader than chattel. BOUVIER, in his law dictionary, says a chattel is a term including all kinds of property, except the freehold, and things which are parcel of it.³

2. *Of the Taking.*

There must be a taking; this implies the consent of the owner to be wanting.⁴

The taking in larceny is either actual or constructive; actual where the party actually gets the goods out of the possession of the owner or his bailee by force or by stealth, or the like; constructive where he obtains possession of them by some trick or artifice, or the like; not having the effect of transferring the right of property but the possession only, having at the time a felonious intent to convert them to his own use, or to deprive the owner of them.⁵

There must be a taking or severance of the goods from the possession of the owner, on the ground that the larceny includes a trespass. If, therefore, there be no trespass in taking goods there can be no felony in carrying them away; yet, although every larceny includes a trespass, the trespass is sometimes constructive only.⁶

¹ *Peo. v. Hill*, 3 Hill, 194.

² *Peo. v. Bradley*, 4 Park. Cr. R., 245.

³ 1 Park. Cr. R., 593.

⁴ 4 Black. Com., 230.

⁵ 2 Arch. Cr. Pr., 362.

⁶ 2 Russ. on Cr., 5; 2 East. P. C., 554; 1 Hawk., ch. 33, § 1.

The cases which have arisen and been decided upon this requisite of the crime of larceny are so numerous, and the distinctions so subtle, that, in order to give a complete statement of the law upon the subject, it will be necessary to go into considerable detail.

Referring however, to the previous definition of larceny, as being the wrongful taking *possession* of the goods of another, with intent to deprive the owner of his *property* in them, we may classify the decisions substantially under the following heads:

I. ACTUAL TAKING.

Where the party actually gets the goods out of the possession of the owner or his bailee by force or by stealth.

II. CONSTRUCTIVE TAKING.

I. Where the goods are delivered by the owner or person having the legal custody or possession of them.

(a) Where the owner delivers his goods generally; that is, where he parts with his property in the goods as well as his right of possession.

(b) Where the goods are delivered by the owner for a bare limited use or charge, the right of property remaining in the owner.

(c) Where the goods are delivered by the owner for the purposes of bailment, the right of property still remaining in the owner.

(d) Where the goods are delivered by the owner, but he is induced to part with the possession of them by trick or fraud, the right of property still remaining unchanged.

II. Cases where the offender has the qualified property and actual possession at the time of the taking of the goods.

III. Where the goods are lost and came into the possession of the taker by finding.

I. Where the Goods are Delivered by the Owner or Person having the Legal Custody or Possession of Them.

(a) *Where the Owner Delivers the Goods Generally, that is, Where He Parts with the Property in the Goods as well as the Right of Possession.*—Where the owner parts with the property in the goods taken there is no larceny in the taking, however fraudulent the means by which such delivery was procured.¹

¹ 2 East. P. C., 666, 969, 693; *Mowray v. Walsh*, 8 Cow., 238; *Ross v. Peck*, 5 Hill, 294.

Thus, upon an indictment for stealing a horse it appeared that the prosecutor was at a fair, having a horse there in the care of a servant, which he intended to sell, when he was met by the prisoner, to whom he was personally known, and who said to him, "I hear you have a horse to sell; I think he will suit my purpose, and if you will let me have him at a bargain I will buy him." The prisoner and the prosecutor then walked together into the fair towards the horse, and upon a view of him the prosecutor said unto the prisoner, "You shall have the horse for eight pounds," and calling to his servant he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor that he would return immediately and pay him. The prosecutor replied "Very well." The prisoner rode away with the horse and never returned. Upon these facts the learned judge before whom the prisoner was tried directed an acquittal, on the ground that there was a complete contract of sale and delivery, and that the *property* as well as the possession was entirely parted with.¹

Also, when the prisoner fraudulently sent a boy to a hatter's to obtain a hat in the name of one of the hatter's customers, and the hatter accordingly delivered the hat upon the strength of such representation, and upon the fraud being discovered shortly afterwards, the prisoner was apprehended with the hat in his possession, it was held that the owner having parted with his property in the hat it was not larceny.²

Also, where the prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him some, to be paid for on delivery, and upon the goods being sent gave the servant who brought them bills which were mere fabrications and of no value, it was held not larceny, for the tradesman had *parted with the property* as well as the possession, upon receiving that which was accepted by his servant as payment, although the bills turned out afterwards to be of no value.³

Also, where the prisoner went to a shop and said that Mrs. D. wanted some shawls to look at, and the prosecutor gave her five shawls, and she pawned two of them the same evening, and the others were found in her lodgings, it was held that, as the prop-

¹ 1 Leach, 467; 2 East. P. C., 669.

² 2 Russ. on Cr., 28; Russ. & Ry. O. C., 225.

³ 2 East. P. C., 671; 2 Leach, 614. See *R. v. Small*, 8 O. & P., 46.

erty in the shawls would continue in the prosecutor until the selection was made, it was larceny, if Mrs. D. did not send for them.¹

So, also, where a delivery of the goods was obtained by fraudulently using the name of another person, to whom, in fact, the credit was intended to be given, and thereby a delivery of some silver coin was obtained, it was held that the owner parted with his property upon the faith that the amount would be repaid at another time.²

Where the prosecutor, having been inveigled by sharpers to bet with them, and suffered by them to win in the first instance, was afterwards stripped of a large sum by losing a bet, and the whole transaction was found by the jury to be a preconcerted scheme to get the prosecutor's money, it was holden *not* to be a felonious taking, as the prosecutor parted with his *property* in his money, under the idea that it had been won.³

Obtaining goods by a fraudulent purchase, the vender delivering them with an intent to part with the property of the goods, in no case constitutes a larceny.⁴

There is a class of cases which seem at first sight somewhat difficult to reconcile with the above rule, but the apparent confliction in the decisions, seems to be removed by the application of the principle that the owner had no intention of parting with his property in the goods. Thus, in one case, the prisoner called at the shop of the prosecutor, and selected a quantity of trinkets, desiring they might be sent the next day to the inn where he lodged. An invoice was made out, and the prosecutor next day carried the articles to the inn; he was prevailed upon by the prisoner to leave them there, under a promise that he should be paid for them by a friend that evening; the prosecutor and prisoner desired that they might be taken care of. Half an hour afterward the prisoner returned and took the articles away; a conviction for larceny was held right.⁵

In another case, the prisoner bargained with the prosecutor for

¹ Rex v. Savage, 5 C. & P., 143.

² 2 East. P. C., 672-673.

³ 2 Leach, 610; 2 East. P. C., 669.

⁴ Mowray v. Walsh, 8 Cow., 238; Ross v. People, 5 Hill, 294; Lewer v. Com., 15 Serg. & Rawle, 93.

⁵ R. v. Campbell, 1 Moody C. C., 179.

some waistcoats, and agreed to pay a certain price for them, but upon their being put into his gig drove off without paying for them, and the jury having found that the waistcoats were parted with conditionally that the money was to be paid at the time, and that the prisoner took them with a felonious intent, it was held larceny.¹

In another case, the prisoner bargained for four casks of butter, to be paid for on delivery, and was told that he could not have them on any other terms; the prosecutor's clerk at last consented that the prisoner should take away the goods on the express condition that they should be paid for at the door of his house. The prisoner never took the goods to his house, but lodged them elsewhere. The judges were of the opinion that a conviction for larceny was good.²

The correct distinction in cases of this description is, that if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods but the right of property in them also, the offence of obtaining them will not be larceny, but the offence of obtaining goods by false pretences.³

(b) *Where the Goods are Delivered by the Owner for a Bare Limited Use or Charge, the Right of Property Remaining in the Owner.*—In that class of cases where the goods are taken by the delivery or consent of the owner, or of some one having authority to deliver them, if it appear that, although there is a delivery by the owner in fact, yet there is clearly no *change of property nor of legal possession*, but the legal possession remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made.⁴

HAWKINS says, where the delivery of the goods is made for a certain special and particular purpose, the possession is supposed to reside unparted with in the first proprietor.⁵

¹ R. v. Cohen, 2 Den. C. C. R., 249. See also R. v. Morgan, 1 Dears. C. C. R., 395.

² R. v. Pratt, 1 Moody C. C., 250.

³ 2 Russ. on Cr., 28.

⁴ 2 Russ. on Cr., 21; State v. Gorman, 2 Nott & McCord, R., 90; Wilson v. State, 1 Port., 118.

⁵ 1 Hawk. P. C., ch. 33, § 9.

Thus, if a person, to whom goods are delivered, has only the bare charge or custody of them, and the legal possession remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use. A doctrine which directly applies to the case of servants, intrusted with the care of goods in the possession of their masters, of which mention will be made presently.¹

So larceny may be committed by a person who is employed for hire to drive cattle to a fair or market, as in such case the owner parts only with the custody and not with the possession.²

So, also, a man may be guilty of larceny in taking a piece of plate set before him to drink from in a tavern, for he has only a liberty to use, not a possession by delivery.³

So if a weaver deliver yarn or silk to be wrought by journey-men in his house, and they carry it away with intent to steal it, the entire property remaining therein in the owner, and the possession of the workmen being the possession of the owner.⁴

Mr. East says that the clear maxim of the common law, established by a variety of cases, is that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use.⁵

A very important distinction is to be made in cases of this nature—whether the owner has parted with the possession of the goods in such a manner and to such an extent as to exclude the idea of trespass, for if the owner of the goods parted with the possession of them without fraud practiced by the taker, and if after the owner had so parted with the possession of them, nothing was done to determine the privity of contract under which the owner had the possession of them delivered to him, no trespass, and therefore no larceny, can be committed by their conversion.⁶

¹ 1 Hale, 506; 2 East. P. C., 682; 2 Russ. on Cr., 21; 1 Hawk. P. C., ch. 33, § 6.

² Rex v. McNamee, R. & M. C. C. R., 368.

³ 1 Hale, 506.

⁴ Kel., 35; 2 East. P. C., 682.

⁵ 2 East. P. C., 564, *et seq.*, and cases there cited.

⁶ 2 Russ. on Cr., 35.

Thus if a watchmaker steal a watch delivered to him to clean, or if a person steals clothes delivered for the purpose of being washed, or goods in a chest delivered with the key for safe custody, or guineas delivered for the purpose of being changed into half guineas, or a watch delivered for the purpose of being pawned, in all these instances the goods taken have been thought at common law to remain in the possession of the proprietor, and the taking of them larceny.¹

But unless in the cases last referred to the privity of contract under which the goods were delivered appeared in some means to be determined, it appears difficult to see how they are distinguishable, some of them at least, from the cases of a goldsmith to whom plate is delivered to work or to weigh, a tailor to whom cloth is delivered that he may make clothes with it, and a friend who is entrusted with property to keep for the owner's use, in which cases a conversion of the goods to whom they are delivered has been said not to amount to felony.²

In these latter cases, as well as in the former, the delivery of the goods is made only for a special purpose, yet it seems that the possession of them has not been considered as remaining with the owner, but as having passed to the party by a lawful delivery, without fraud, and therefore not the subject of a subsequent felonious conversion. The distinction, indeed, between a bare charge or special use of goods and a general bailment of them, seems to be sufficiently intelligible, and it seems consistent with principle that in the former case the legal possession should be considered as remaining in the owner, and in the latter as having passed to the bailee, and that therefore in the former case larceny may be committed of them by the person to whom they have been delivered, and that in the latter it may not, unless there be a determination of the privity of contract; but it is in the application of this doctrine to particular cases that the distinctions seem to be obscure.³

This principle has been holden to extend to a tailor who has cloth delivered to him to make clothes with, a carrier who receives goods to carry to a certain place, and a friend who is

¹ 1 Hawk. P. C., ch. 33, § 10.

² 2 Russ. on Cr., 22; 1 Hawk. P. C., ch. 33, § 2; 2 East. P. C., 693.

³ 2 Russ. on Cr., 22.

intrusted with goods to keep for the use of the owner, which they afterwards severally embezzle.¹

And so if a watch be delivered to a person to mend and he sells it, this has been held no larceny.² So also if plate be delivered to a goldsmith to work or to weigh, or as a deposit, it has been held that his conversion of it will not be larceny.³

We have already seen above that some of the cases of this nature seem to make a near approach to those where a bare charge or mere special use of the goods is transferred by the delivery, and where consequently the legal possession or property of them remaining exclusively in the owner, larceny may be committed in respect of them exactly as if no delivery at all had been made.

It has been suggested, as worthy of consideration, whether the distinction concerning the legal possession remaining in the owner after a delivery in fact, does not extend to all cases where the thing, so delivered for a special purpose, is intended to remain in the presence of the owner. It has been said that, in cases of this kind, the owner cannot be said to repose any confidence in the party in whose hands it is so in fact placed, and that the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before, and the person to whom it is so delivered, has at most, no more than a bare, limited use or charge, and not the legal possession of it.⁴

Thus, if a man give goods to another to carry, or the like, and he himself be present all the time, this is not a bailment, nor is the owner deemed to have parted with the possession of the goods; and if the person to whom such goods are entrusted, run away with them, he is guilty of larceny.⁵

Clerks or Servants.—Servants who have the bare charge or custody of the goods of their master, are not bailees within the rules as to larceny by bailees, for the possession of the servant is always deemed the possession of the master, and if he dispose of the goods to his own use, he is guilty of larceny.⁶

¹ Kel., 43; 2 East. P. C., 660; 2 Leach, 1064, note; 2 Russ. on Cr., 56.

² R. v. Levy, 4 C. & P., 241.

³ 1 Shaw., 52; 2 East. P. C., 693.

⁴ 2 East. P. C., 683, 684; 2 Russ. on Cr., § 24.

⁵ 2 East., 683-684.

⁶ 2 Arch. Cr. Pr., 387.

Thus, if a servant, entrusted with the care of a horse of his master, takes it from the stable of his master with intent to run away with it, he is guilty of stealing. The horse in the stable of his master is, not only in the constructive, but in the actual possession of the master, and not of the servant.¹

A servant has the charge, but not the possession of his master's goods. The possession is in the master, and the servant may commit larceny by converting the property with which he is thus entrusted, to his own use. This principle applies to servants so called, as it also does to apprentices, clerks and workmen of every description, who are employed in the care and management of the owner's property, under his immediate supervision and control.²

EAST says this rule appears to hold universally in the case of servants whose possession of their master's goods, by their delivery or permission, is the possession of the master himself.³

Thus, it was said, if a gentleman's butler, having the care and custody of his plate, or the shepherd of his sheep, embezzle them, they are as much guilty of larceny as if they took them out of the actual custody of their master.⁴

So, where a carter went away with, and disposed of his master's cart,⁵ or a porter with goods which his master sent him to deliver to a customer,⁶ or where a person employed to drive cattle,⁷ or a clerk sent with a bill of exchange to take to a banker's,⁸ in all these cases they were severally held to have the custody merely, and not the right of possession.

Where the holder of a promissory note, having received a partial payment from the prisoner, who was the maker, handed it to him to indorse the payment, who took it away and refused to give it up, held that the possession remained in the owner, the prisoner acquiring only a temporary charge or custody for the special purpose, and that his subsequent conversion, the jury having found it felonious, was larceny: that the note was received by

¹ *Peo. v. Woodr.*, 2 Park. Cr. R., 22.

² *Peo. v. Call*, 1 Den., 120.

³ 2 East. P. C., 564.

⁴ 1 Hale, 506; 1 Hawk., ch. 33, § 6.

⁵ *Robinson's Case*, 2 East. P. C., 565.

⁶ *Bass' Case*, 2 East. P. C., 566; 1 Leach, 285.

⁷ *R. v. Mane*, 1 Mood. C. C., 368.

⁸ 2 East. P. C., 565-567; 2 Leach, 805.

the prisoner as a servant of the holder, and the legal possession was not changed, though the prisoner was in charge of the note while making the indorsement, the owner still had possession.¹

If money has been in the possession of the master by the hands of one of his clerks, and another of the clerks receives it from such clerk and embezzles it, it is larceny.²

The question has arisen, whether a person employed to drive cattle from one place to another is to be regarded as a bailee or a servant. Where the party so intrusted is a driver by trade, and by the custom of the trade he may drive the cattle of several persons at the same time if he be employed as a drover, this rebuts the presumption of his being a mere servant, and he must be deemed a bailee.³ But if he be not a drover, but merely a person employed by a man to drive his cattle from one place to another for wages, he may be deemed and treated as the other's servant.⁴ But in these cases he must dispose of the property while he has it in his possession, for if he deliver it to another person, who holds it with the owner's consent, it is not larceny, though he afterwards sell it and dispose of the money to his own use.⁵

Where the prisoner acted as a nurse to the prosecutor's daughter, who was sick, and had her board and lodging in the house, receiving occasionally small presents of money for her services, but no wages; she was held not to be a servant.⁶

If the owner of goods employ a person not in his service to take them to a customer and show them to him, and bring them back again, without authorizing him to sell them to the customer or leave them with him, and he sell them instead of taking them to the customer, he was said to be guilty of larceny; but in such case, if he was either authorized to sell them to the customer or to leave them with him, he was said not to be guilty of larceny. In the first case he was held simply to be a servant, having the custody of them, and whose duty it was to bring them back, and in the other case he was said to be in the situation of a bailee.⁷

¹ *Peo. v. Call*, 1 Den., 120.

² *Rex v. Murray*, R. & M. C. C. R., 276; 5 C. & P., 145.

³ *R. v. Goodbody*, 8 Car. & P., 665.

⁴ *R. v. Goode*, Car. & M., 582; 2 Arch. Cr. P., pp. 382-385-444.

⁵ 1 C. & Mars., 611.

⁶ *R. v. Smith*, 1 Car. & K., 423.

⁷ *Reg v. Hervey*, 9 C. & P., 353.

In further considering the question of larceny by servants, we come to the second subdivision previously mentioned, and that is cases *where the offender has the qualified property and actual possession of the goods at the time of the taking.*

It should be observed that, in all the cases relating to the fraudulent conversion by a servant to his own use of the goods of his master, it was considered that the property stolen was sufficiently received into the possession of the master before the taking of the servant, and this leads to the consideration of a material distinction respecting the possession of the master, namely, that that the property will not be considered as sufficiently received into his possession where it has been merely delivered to the servant for the master's use. Upon which subject it is well laid down that if the servant has done no act to determine his original lawful and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes; and as against third persons this is, in law, a receipt for the goods by the master, yet it has been ruled otherwise in respect of the servant himself, in a charge of larceny at common law in converting such goods to his own use.¹

Thus where a servant or clerk had received property for the use of his master, and the master never had any other possession than such possession by his servant or clerk, it was doubted whether the latter was guilty of larceny in stealing such property, or was guilty merely of a breach of trust.² So if a clerk received money of a customer, and without at all putting it in the till converted it to his own use, he was guilty only of a breach of trust, though had he once deposited it, and only taken it again, he would have been guilty of larceny.³ So a cashier of a bank could not be guilty of larceny in taking an India bond which he had received from the court of chancery, and was in his actual as well as constructive possession.⁴

This class of offences, though not punishable as larceny, may yet, however, be reached under a prosecution for embezzlement, which is in itself a species of larceny, and is said to be distin-

¹ 2 East. P. C., 568; Arch. Cr. P., 446, notes.

² 2 Leach, 835; Hale, 668; East. P. C., 570-1. And see 4 Taunt., 258; Russ. & Ry. C. C., 215, S. C.; 2 Leach C. C., 1054.

³ 2 Leach, 835.

⁴ 1 Leach, 28.

guished from larceny properly so called, as being committed in respect of property which is not at the time in the actual or legal possession of the owner.¹ So in cases where a clerk or servant embezzles any chattels received by him for or in the name of his master, which was not received into the possession of the master, otherwise than by such clerk or servant, the prosecution should, in strictness, be for embezzlement and not for larceny.²

(c) *Where the Goods are Delivered by the Owner for the Purposes of a Bailment.*—Mr. Justice STORY defines a bailment as “a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.”³

The question of bailment, however, must not be confounded with a bare use or charge of goods where the possession is supposed to reside unparted with in the first proprietor.⁴

The rule was originally laid down, that inasmuch as to constitute larceny there must be such a taking as would either actually or constructively amount to a trespass, if a party obtained the possession of goods lawfully, as upon a bailment, or on account of the owner, he could not afterwards, as long as that bailment continued, be guilty of larceny in appropriating the goods in any way whatsoever, as the wrongful change of possession, a necessary ingredient in larceny, had never taken place.⁵

Thus it is said that if goods be bailed by the owner to another, the bailee, whilst the bailment subsists, cannot in general be said to commit larceny of them by converting them to his own use, because in such a case there is no felonious taking, the bailee being already in possession of the goods.⁶ For if goods were delivered to a carrier to be conveyed, and he steals them on the journey, it was held to be no larceny.⁷ So where the prosecutor delivered a horse to the prisoner to be pastured, and the latter, after keeping the horse one week, for which he received payment, sold it in the course of the second week, a conviction for larceny was reversed.⁸

¹ Bur. Law Dict., vol. 1, 415.

² 2 Arch. Cr. P., 445.

³ Story on Bailm., § 2.

⁴ Ante.

⁵ Roscoe's Cr. Ev., 6 Ed., 580; 2 East. P. C., 694; 1 Leach, 411.

⁶ 1 Hawk., ch. 33, § 2; R. v. Smith, R. & M., 473.

⁷ 1 Hale P. C., 504.

⁸ R. v. Smith, 1 Mod. C. C., 474.

Sir WILLIAM RUSSELL says it appears always to have been considered that where a horse was delivered upon hire or loan, and such delivery was obtained *bona fide*, no subsequent wrongful conversion, pending the contract would amount to felony, and so of other goods.¹

The rule was formerly laid down by EAST that, after the determination of the special contract by any plain and unequivocal wrongful act of the bailee, inconsistent with that contract, the property as against the bailee, reverts to the owner, although the actual possession remains in the bailee, and that the privity of contract may be determined before its regular completion by the tortious acts of the bailee. Thus, it was said, that where the key of a room was delivered for the purpose of intrusting a party with the care of goods in a room; by the act of taking the goods with a felonious intent, out of the room in which they were intended to remain for safe custody, the privity of contract would have been determined.² But in the recent English cases of *R. v. Banks* (Russ & Ry., 44), and *R. v. Stear* (1 Den. C. C., 349), and *R. v. Brook* (Russ & Ry., 441), the above doctrine was said not to be correct.

ROSCOE says, the judges seem never to have been inclined to hold that an appropriation of the goods to the bailee's own purposes, was in itself a determination of the bailment, or, as we should say, looking to the definition of larceny, a wrongful change of possession, and that whenever this point has directly arisen, it has always been ruled in favor of the prisoner.³ And, it seems, from the weight of authority, that where a bailment regularly subsists, the principle that it is not larceny for a bailee to convert to his use the goods bailed to him, has been sustained, except in the case of bailees, who are guilty of what is technically termed a breaking of bulk, by which is meant a carrier or other bailee, opening a bale or package intrusted to him, taking out a part, and disposing of that part to his own use.

Where the prisoner was employed to land a boat-load of stoves from a ship, and he landed them all but two, and those he secreted in the bottom of the boat, it was held that the separating of the two from the rest, and secreting them, was equivalent to

¹ 2 Russ. on Cr., 56; 2 East. P. C., 693; 1 Hale, 504.

² 2 East. P. C., 685-691, 627.

³ Ros. Cr. Ev., 6th ed., 584.

breaking the bulk, and that the prisoner was guilty of larceny.¹ If corn be sent to a miller to be ground, and he takes part of it, he will be guilty of larceny.² And where a miller, having received barrilla to grind, fraudulently abstracted part of it, returning a mixture of barrilla and plaster of paris, it was considered larceny.³ But, where the prosecutor sent three trusses of hay to another person by the prisoner's cart, he delivered two only, and the other was found in his possession, not broken up, PARKE, J., held this not larceny, as the truss had not been broken up.⁴ So, also, a common carrier who was employed by the prosecutor to carry a cargo of coal from a ship to the prosecutor's yard, sold two cart loads of coal on his own account, but duly delivered the balance, held that, as there had been no breaking of bulk or other determination of the bailment, he could not be convicted of larceny.⁵

The Court of Appeals of this State have held that where the commodity, a part of which is separated by the carrier from the rest, is transferred in commerce by weight, and not by count, the severance is a trespass, which determines the privity of contract, and a breaking of bulk, equivalent to the opening of a bale or package, and that, therefore, the separation and conversion to his own use by the carrier, without the consent of the owner, of sundry bars of pig iron, part of a larger number, which had been delivered to him for transportation, and loaded upon his canal boat, is larceny.⁶

Some authors have treated this question of breaking bulk as the evidence of an original felonious intention, by an unequivocal determination of the privity of contract. Thus Lord COKE, HAWKINS and HALE have said: "If a carrier or other bailee open a bale or package of goods intrusted to him, take out a part and dispose of that to his own use, this is always considered such proof of an original felonious intention that it has always been holden to be larceny."⁷

¹ R. v. Howell, 7 Car. & P., 325.

² 1 Roll. Abr. 73.

³ Com. v. James, 1 Pick., 375.

⁴ R. v. Paatley, 5 C. & D., 533.

⁵ Reg. v. Cornish, 33 Eng. L. & Eq. Rep. 57.

⁶ 17 N. Y. (3 Smith), 114.

⁷ 1 Hale, 505; 3 Inst., 107; 1 Hawk., ch. 33, § 4.

But if he dispose of a whole bale or package, without breaking, it is deemed a breach of trust only, and not larceny, unless it appeared that he had a felonious intent at the time he received it.*

EAST said this doctrine had been considered as standing more upon positive law, not at this time to be questioned, than sound reasoning. The distinction appears to have proceeded upon the ground that the act of breaking the package is an act of trespass in the carrier, by which the privity of contract is determined; whereas if there be no breaking of the package, no severance of a part of the commodity from the rest by the carrier, but the whole of it be parted with by him in the state in which it was delivered to his hands, there will be nothing which will amount to a trespass while the package remains in his possession.¹

MR. COLLYER remarks: "The cause of the distinction is to be found in the necessity of an accurate distinction between a breach of trust and an act of felony; and the principle is, that felony cannot be committed by a person having the legal possession of goods; as, for instance, under a contract. The contract must be put an end to before felony can be committed; for during its existence the person having possession under it has *prima facie* a legal possession, therefore, by selling the goods without breaking, he in fact destroys the privity of contract, still that act is executed in respect of goods which are at the time in his legal possession; the termination of the contract and the act of conversion being contemporaneous, there is not therefore a caption, and an asportation of the goods of another, which is essential to an offence of larceny."²

In some cases savoring of a bailment, such as the obtaining of the possession of a horse upon fraudulent pretence of a hire, and where the property has been subsequently sold or disposed of by the person obtaining the property, it would at first seem that the basis of the decisions was the doctrine advanced by MR. EAST, that the privity of contract of bailment may be determined before

¹ 3 East. P. O., 697.

² Collyer Colln. of Statutes.

* The question of taking and converting property in the mass, as it was delivered, without the breaking of bulk, belongs more appropriately to the offence of *Embezzlement*, and will be found discussed under that head.

its regular completion by the tortious acts of the bailee inconsistent with those of the contract of bailment, and that unequivocal evidence of some other determination of the contract might be shown before its completion, other than the breaking of bulk by the bailee; but upon a careful examination of these cases it will be seen that they are regarded as if no bailment ever existed of the property, but as falling within that class of cases where the owner is induced to part with the possession only, of his property, by means of some trick or fraud, which artifice may be the pretence or color of a bailment.¹

Where it appears that the delivery of the goods by the owner or person authorized to dispose of them was not obtained fraudulently and with intent to steal, a remaining inquiry may be whether such lawful possession has been determined, and whether there has been any new and felonious taking.² So after the bailment is determined, any taking by him who was a bailee, with a felonious intent, will be larceny. Thus, if a carrier, after he has brought the goods to the place appointed, take them away again, *animo furandi*, he is guilty of larceny, for his possession as bailee being determined, his second taking is the same as if he were a mere stranger.³ Indeed, this seems to be the correct rule upon which the question of breaking bulk has been determined, i. e., that by the breaking of the package or bale the courts have said the bailment was determined, and hence the subsequent conversion was a new taking and asportation.

It was formerly held that if the hiring of a horse was limited to a particular time or place, and after that time had expired, or the party had arrived at the proper place for the redelivery, he rode away with the horse and converted it to his own use, it was larceny.⁴

But in a later case the question was considered and a contrary doctrine held. In this case the prisoner borrowed a horse to take a child to a surgeon, and after he had done so and returned, he took the horse in a different direction and sold it. The jury were satisfied that he had no felonious intention when he borrowed it, but as the purpose for which he hired was over before

¹ See cases cited in 2 Russ. on Cr., §§ 50, 51.

² 3 Inst., 107.

³ 1 Hawk., ch. 33, § 11.

⁴ 1 Leach, 409; 2 East, P. C., 689-694.

he took the horse to the place where he sold it, the jury were directed to convict, in order that the point might be considered, and upon a case reserved the judges held that there was no felonious taking, and that the conviction was wrong.¹

The question to be examined in these cases is whether the lawful possession has been determined, and whether there has been any new and wrongful taking. If the lawful possession has not been determined the goods will continue in the possession of the party to whom they were delivered by *bailment*, and the general principle of law will prevail, that if a person obtain the goods from another without fraud, although he have the *animus furandi* afterwards, and converts them to his own use, it is not felony.²

The rules above laid down as to carriers and other bailees, however, does not extend to their servants, for if a servant of a carrier convert the property intrusted to him to his own use, he will be guilty of larceny, even in cases where his master would be guilty only of embezzlement or of a breach of trust.³

A person employed as a laborer to discharge the cargo of a vessel does not stand in the relation of a bailee to the property of which the cargo consists.⁴

(d) *Where the Goods are Delivered by the Owner, but he is Induced to Part with the Possession of them by Trick or Fraud, the Right of Property Still Remaining Unchanged.*—In the second and third subdivisions of the cases already noticed, where the owner has parted with the possession of the goods in the one instance for a bare use or charge, and in the other for the purposes of a bailment, the right of property, or as it is sometimes styled in the books, the legal possession, still remaining unparted with in the owner, it will be noticed that no direct fraud, trick or artifice was resorted to for the purpose of obtaining the possession of the property. In the first class of cases above noticed, attention has been called to a taking by fraud or artifice, but where the owner parted with his right of property as well as right of possession. Under the present subdivision it is intended to notice another class of cases, where the owner is induced through fraud, trick or artifice to part with the possession of the

¹ Russ. & Ry., 441.

² Russ. on Cr., 56; 3 Inst., 107; 2 East. P. C., 693.

³ Rex v. Harding *et al.*, R. & Ry., 125.

⁴ Com. v. Doane, 1 Cush. R., 5.

property only, the right of property still remaining unchanged in the owner. This latter class of cases consists principally of those transactions usually known by the term "swindling." As already noticed, in some of the cases referred to under the first subdivision, it would at first sight seem difficult to reconcile the doctrine laid down as applicable to the latter class of cases with the rule stated under the first subdivision, except upon the doctrine that the owner had no intention of parting with his property. And as previously stated in regard to other distinctions made by the courts upon this feature of larceny, the obscurity seems to consist more from the characteristics of each particular case, rather than the principles of law laid down by the courts.

Thus, prevailing on a tradesman to take goods to a place on pretence that he shall then be paid for them, and inducing him to leave them in the care of a third person, and then getting them from him without paying for them, is larceny, if the intent, *ab initio*, was to get the goods without paying for them.¹ Also, where a hosier, by the desire of the prisoner, took a variety of silk stockings to his lodgings, where the prisoner pretended to purchase some of them, and set them apart from the rest, and then having sent the hosier to fetch some more articles, decamped with the stockings, this was holden to be larceny.² Where the owner of goods sent them by his servant to be delivered to A, and the prisoner fraudulently procured the delivery of them to himself by pretending to be A, it was held larceny.³ So getting goods delivered into a hired cart, on the express condition that they should not be taken out of the cart until they were paid for, and then getting them from the cart without paying the price, was held larceny if the prisoner intended *ab initio* to defraud.⁴

Obtaining goods from a servant by payment of a bad half crown, the servant having no authority to part with the goods, was held larceny if the intent was to obtain the goods without paying for them.⁵ So, also, if a tenant get a receipt for his rent

¹ *Rex v. Campbell*, R. & M. C. C. R., 179; cited in *Stephens v. Hart*, 4 Bing., 476.

² *Rex v. Sharpless*, O. B., 1772; 1 Leach, 92; 2 East. P. C. 675.

³ 1 Leach, 520; 2 East. P. C., 673; *Wilkins' Case*, O. B., 1789.

⁴ *Rex v. Pratt*, R & M. C. C. R., 250.

⁵ *Rex v. Small*, 8 C. & P., 46.

from his landlord on pretence of wanting to look at it, with intent to defraud him of part of his rent, it is a larceny of the receipt.¹ So, also, where the prisoner, intending to steal the mail bags from the post office, procured them to be let down to him by a string from the window of the post office, under the pretence that he was the mail guard, this was held to be larceny.²

J., by falsely representing to S. that he had sold for S. a quantity of goods to R. H. & Co., induced S. to send the goods to the store of R. H. & Co.; J. then went to the store of R. H. & Co., with whom he had in fact no dealings on account of S., and informed them that the goods were sent there by mistake, and induced them by such misrepresentation to deliver the goods to him, and took them away from the store of R. H. & Co., and converted them to his own use, it was held that this was larceny and not simply obtaining goods by false pretences.³

The cases above cited are a portion of those illustrating the doctrine laid down in this class of cases. The list of cases cited in the books are very numerous, and embrace a large variety of circumstances where the doctrine is established that where the goods are delivered by the owner or person having the legal custody or possession of them, and he is induced to part with their possession through artifice or fraud, the right of property still remaining unchanged, the offence is larceny.

In some of the cases of this description the delivery of the goods taken has been only by way of pledge or security, but the same doctrine has been held to apply if such delivery were obtained fraudulently and with intent to steal.⁴

The latter cases embrace those transactions called "ring dropping" and "pocket-book finding." Thus, where the prisoner, being in company with the prosecutor, pretended to find a valuable ring. The prosecutor was to have a share of the pretended value of it, and was prevailed upon to deposit his watch and to take the ring until his share of the value should be paid. The accomplices of the prisoner made off with the watch, and the ring proved to be of a small value. The prisoner was found guilty of

¹ R. v. Rodway, 9 C. & P., 784.

² East. P. C., 603.

³ Peo. v. Jackson, 3 Park. Cr. R., 590.

⁴ 2 Russ. on Cr., 46.

larceny.¹ So where the prisoner induced the prosecutor to deliver a sum of money, by way of pledge for a counterfeit jewel pretended to be found, with intent to steal the money, it was held larceny; it appearing that the money was deposited in the nature of a pledge, so that though the possession was parted with, the property was not.²

But if, in such a case, the prosecutor part with the money intending to have the articles himself and sell them, it is not larceny; for he meant to part with the property in the money as well as the possession of it, which comes under the head of the first class of cases above cited.³

Where the prosecutor was induced by a preconcerted plan to deposit money upon a bet, and the stakeholder afterwards, upon a pretence that one of his confederates had won the wager, handed the money over to him, and the jury found that, at the time the money was taken, there was a plan to keep it under the false color of winning the bet, this was held a larceny; for the prosecutor parted with the possession only and not the right of property, which was to pass eventually only in case he really lost the wager.⁴

The delivery may also be obtained in this class of cases by a fraudulent abuse of legal process. Thus, if a person intending to steal a horse, take out a replevin, and having thereby procured the horse to be delivered to him by the sheriff, rode him away, it has been held larceny.⁵

II. Cases where the Offender has the Qualified Property, and Actual Possession at the Time of the Taking of the Goods.

It seems to have been considered in cases of clerks who have a qualified property in goods, which have been received by them, and never come into their master's possession, and in the case of bailees, who have a qualified property in goods by virtue of their contract, that a subsequent conversion of the goods by such persons will not amount to larceny, except in instances where the latter have broken the bulk. These classes of cases have already been considered under the head of larceny by servants and bailees,

¹ 1 Leach, 238; 2 East. P. C., 678; Patch's Case, O. B., 1782.

² 1 Leach, 314; 2 East. P. C., 679; Moore's Case, O. B., 1784.

³ R. v. Wilson, 8 C. & P., 111.

⁴ Russ. & Ry. C. C., 413. See also Com. v. Wentworth, 2 Whee. Cr. C., 511.

⁵ 1 Hale, 507; 3 Inst., 108; 2 East. P. C., 660.

and appear to be governed by the principle involved in the first class of cases cited above, where it is held that where the owner has parted with his property in the goods, as well as his possession, the subsequent commission will not amount to larceny.

III. *Where the Taking is by Finding.*

It was anciently said there is one case in which it has been holden that the taking will not amount to larceny, though it be accompanied with the *animus furandi*, and that is where the taking is by a finding of the property; thus, it was laid down in the older books, that if one loses his goods, and another find them, though he converted them *animo furandi* to his own use, yet it is no larceny, for the first taking was lawful.¹

Thus it was held, that if A find the purse of B in the highway, and take it and carry it away, with all the circumstances that usually prove the *animus furandi*, as denying it or secreting it, yet it was said not to be larceny.²

The rule, however, may be stated to be, that if a man lose goods, and another find them, and appropriate them to his own use, it is larceny, or not, according to circumstances.

At common law it was said the doctrine of a taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner, and does not color a felonious taking under such a pretence.³

It will not avail, therefore, where a man's goods, being in a place in which ordinarily or lawfully they are, or may be placed, a person takes them *animo furandi*.⁴ If, therefore, a man's horse be going in his grounds, or upon his common, or stray into a neighbor's ground or common, and a person takes it *animo furandi*, it is no finding, but a larceny.⁵ So, also, where a customer left his whip in a store, and the store-keeper took the whip *animo furandi* and concealed it, it was held in this State that the defendant was not in any proper sense of the term the finder of lost property. The fact that the prosecutor went out of the store and was absent some fifteen minutes before

¹ 1 Hawk. P. C., ch. 33, § 2; 3 Inst., 108.

² 1 Hale, 506.

³ 1 Hale, 506; 2 Russ. on Cr., 11; 2 East. P. C., 664.

⁴ 1 Hale, 506.

⁵ 1 Hale, 506; 2 East. P. C., 664.

he returned to take the property, did not change the possession. In judgment of law the possession still remained in him.¹ So, also, where A placed his pocket-book on the table of a shop until he could get a bill changed, and on leaving the shop forgot to take it, but, on missing it, immediately recollected where he had left it. The property was held not to have been lost, but the subject of larceny.²

A gentleman left a trunk in a hackney coach and the coachman took and converted it to his own use; this was held larceny at the common law, on the ground that the coachman must have known where he took up the gentleman and his trunk and where he set him down, and that he ought, therefore, to have restored it to him.³

In a later case, the prisoner found a pocket book containing bank notes in the highway, and afterwards converted it to his own use. The court observed, that if a party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion will constitute a felonious taking;⁴ and in a subsequent case, GIBBS, J., stated to the jury that it was the duty of every man who found the property of another to use all diligence to find the owner, and not to conceal the property (which was actually stealing the property), and appropriate it to his own use.⁵

In the later case, the prisoners found a bill of exchange, and endeavored to convert it to their own use by negotiating it, it was held larceny.

In another case the prosecutor had his hat knocked off by some one, and the prisoner, who had his own hat on his head, picked up the prosecutor's hat and carried it home. PARK, J., said: "If a person picks up a thing when he knows that he can immediately find the owner, and, instead of restoring it to the owner, he converts it to his own use, this is larceny."⁶ The con-

¹ *Peo. v. M'Garrin*, 19 Wend., 460.

² *Lawrence v. State*, 1 Humph., 228. See also *R. v. West*, 29 Eng. L. & Eq. R., 525.

³ 2 East. P. C., 664; *Lamb's Case*, O. B., 1694. See also 1 Leach, 413-415.

⁴ 2 Russ. on Cr., 14.

⁵ *Id.*

⁶ *Rex v. Pope*, 6 C. & P., 346.

version of a large sum of money, with a felonious intent, which was found in a bureau delivered to a carpenter to be repaired, was also held larceny.¹

In another English case, where money found in the secret drawer of a bureau was appropriated to his own use by the purchaser of the bureau, it was held that, if the purchaser knew that the bureau and not its contents were sold to him, it was larceny, otherwise, if he had reasonable ground for believing that he bought both the bureau and its contents.²

The court, in commenting upon the above case, said: "The old rule, that if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny, has undergone, in more recent times, some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if from any mark upon it, or the circumstances in which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constitutes a larceny. Under this head fall the cases where the finder of a pocket book, with bank notes in it, with a name on them, converts them *animo furandi*, or a hackney coachman who abstracts the contents of a parcel, which has been left in his coach by a passenger whom he could easily ascertain, or a tailor who finds and applies to his own use a pocket book in a coat sent to him to repair by a customer whom he must know, all these have been held to be cases of larceny, and the present is an instance of the same kind, and not distinguishable from them."

Mr. Archibald, in his treatise upon criminal law, section 388, in commenting upon the case *R. v. Thurborn* (2 Car. & K., 831), says, from this decision, which may be considered a safe guide in all these cases hereafter, it appears that a taking by finding in larceny may be classed under these heads:

First.—Where upon the finding the party has no intention to appropriate the thing found to his own use, but on the contrary, intends to restore it to the owner if he can be found, but afterwards he disposes of it to his own use, either before or after he knows who the owner is, this is not larceny, because there was no *animo furandi* at the time of the taking.

Second.—Where a man finds goods that have been actually

¹ 8 Ves. 405; 2 Leach, 952.

² *Merry v. Green*, 7 M. & W., 623.

lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing then that the owner cannot be found, and he afterwards disposes of them to his own use, either before or even after he knows who the owner is, it is not larceny, because the taking, though not exactly innocent, was not punishable, and could not be made the subject of an action of trespass.

Third.—Where a man finds goods that have been actually lost, or are reasonably supposed by him to be lost, and appropriates them with intent to take the entire dominion over them, he at the same time knowing or reasonably believing that the owner can be found, this is larceny, whether the finder afterwards converts them to his own use or not.

Sir WILLIAM RUSSELL says: "It would seem that in cases of this kind the jury, before they convict, ought to be satisfied that the prisoner intended at the time when he found the article to convert it to his own use, for if at the time he found the article he took it with the intention of discovering the owner and restoring it to him, and it afterwards came into his mind to convert it to his own use, and he did so, it would not be larceny."

Thus, a coat was left lying on a stone seat by a road side, and was soon afterwards found in the prisoner's possession; the jury was instructed that in order to find the prisoner guilty of larceny they must be of the opinion that at the time he took the coat he did so *animo furandi*; that he might have taken it very honestly, intending if it were inquired after to restore it to the owner, or he might have taken it intending to make it his own.²

In this State it has been held that a *bona fide* finder of an article lost, as a trunk containing goods lost from a stage coach and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found.³

In the case of the *Peo. v. Swan* (1 Park. Cr. R., 9), Judge WILLARD observed: "It has been said if a man lose goods, and another find them, and not knowing the owner convert them to his own use, it is no larceny. This rule supposes that the finder acts *bona fide*, is ignorant of the owner, and may therefore have

¹ 2 Russ. on Cr., 18.

² Milburne's Case, 1 Lew., 251.

³ *Peo. v. Anderson*, 14 John., 294.

a warrantable ground to suppose that the goods will never be claimed and the owner will never be discovered." Such seems to have been the view of the Supreme Court in the case of the *Peo. v. Anderson, supra*. The particulars of that case are not detailed, but it is assumed that the owner had lost the goods and that the defendant was an honest finder. The law, however, clearly holds a prisoner guilty criminally, who, knowing the owner, converts the property to his own use. It is the duty of the finder to restore property which he has found to the rightful owner, and if there are marks upon it by which the owner can be ascertained, or if he has reasonable ground to believe who the owner is, he will be guilty of larceny if he convert it to his own use. So, also, in this State, where property (*e. g.* a pocket-book containing bills) with no mark about it indicating the owner, was lost and found in the highway, and there was no evidence to show that the prisoner at the time knew who the owner was, it was held that he could not be convicted of larceny, though he fraudulently and with intent to convert the property to his own use, converted the same immediately afterwards.¹ So, also, it was held that where the finder of lost property, at the time of finding, has no means of discovering the owner, he will not be guilty of larceny, although he afterwards has means of finding him; but he, nevertheless, retains the property to his own use.²

It has been stated in some of the English cases, that it is the business of the finder to advertise the found property, and if he does not, the fact of finding is no excuse to a prosecution for larceny.³ But in the case of the *Peo. v. Cogdell* (1 Hill, 94, *supra*), this point was doubted.⁴

In another English case, where on the trial of a servant, who, being indicted for stealing bank notes, the property of her master, in his dwelling-house, set up as her defence that she found them in the passage, and kept them to see if they were advertised, not knowing to whom they belonged, PARKE, J., held that she ought

¹ *Peo. v. Coydell*, 1 Hill, 94. See also *Peo. v. M'Garren*, 17 Wend., 460; *State v. Weston*, 9 Conn. R., 527; *R. v. Mole*, 1 Car. & K., 417.

² *R. v. Dixon*, 36 Eng. L. & Eq. R., 597.

³ *R. v. Coffin*, 2 Cox, 44; *R. v. Reed*, Car. & M., 307; *R. v. C—*, 1 Crow. & D., 161.

⁴ See also *Lane v. People*, 5 Gilman, 305.

to have inquired of her master, whether they were his or not, and that, not having done so, but having taken them away from the house, she was guilty of stealing them.¹

Where the prosecutor lost a gold chain, and the prisoner was sent to look for it in the garden, where she had been walking, and, having found it, without disclosing the fact, took it home, and kept it until a reward had been offered, and refused to give it up until the reward was paid, it was held larceny.²

The rules above laid down in regard to inanimate chattels, are not applicable to cattle, which have strayed from the inclosure of the owner upon the public highway. And where cattle were found upon the public highway, under such circumstances, and were driven by the finder to market, with the intention of converting them to his own use, he was adjudged guilty of larceny. Domestic animals are always presumed to have *animus revertendi*, and the fact that they have broken out of an inclosure, or are found at large in the highway, does not give any person meeting them a right to presume that the owner has lost them, and has no expectation of finding or reclaiming his property, as in the case of money or a pocket-book, or the like, accidentally dropped.³

It has been said that the law, with regard to the finder of lost property, does not apply to the case of property of a passenger accidentally left in a railway carriage, and found there by a servant of the company, and such servant is guilty of larceny, if, instead of taking it to the station or superior officer, he appropriates it to his own use.⁴

3. *Of the Carrying Away of the Goods Stolen.*

BLACKSTONE says there must not only be a taking, but a carrying away.⁵ The technical term used to designate this portion of the offence is called an *asportation*.

It appears to have been well settled at the common law that the felony lay in the very first act of removing the property, and therefore that the least removing of the thing taken from the place where it was before, with an intent to steal it, is a sufficient

¹ R. v. Kerr, 8 C. & P., 177.

² R. v. Peters, 1 Car. & K., 245.

³ Peo. v. Kaats, 3 Park. Cr. R., 129.

⁴ R. v. Pierce, 20 L. J., 182.

⁵ 4 Black. Com., 231.

asportation, though it be not quite carried away.¹ Thus, it was held that a person who had taken a horse in a close, with an intent to steal him, and was taken before he could get him out of the close, that he was guilty of larceny.² Also, where a man intending to steal plate takes it out of the trunk which contained it and places it on the floor, but is detected before he can carry it away, it was held a sufficient asportation.³ So, also, where the prisoner tapped a barrel of beer with intent to steal the beer, and as the beer was running from the barrel into a can he was detected.⁴ Also, where a man caused a mare to be brought from the stable into the yard, with intent to steal it, but before he could mount and ride away he was detected, this was held a sufficient asportation.⁵ It was also holden by all the judges that the removal of a parcel from the head to the tail of a wagon, with an intent to steal it, was a sufficient asportation to constitute larceny.⁶ Also, where a guest who had taken the sheets from his bed, with an intent to steal them, and carried them into the hall, was apprehended before he could get out of the house, it was holden that he was guilty of larceny.⁷ Also, where the prisoner fraudulently fixed a pipe connecting the entrance and exit pipes of a gas meter, by which the gas rose to the burners and was consumed, the meter thus failing to show all the gas consumed, the prisoner having no contract giving him any interest in or control over the gas until it passed the meter, it was held that there was a sufficient asportation of the gas, and that the prisoner was guilty of larceny.⁸ Also, where a servant *animo furandi* took his master's hay from the stable and put in his master's wagon, it was held a sufficient asportation.⁹

There are cases where there is deemed to be no asportation, on account of there having been no severance of the goods.

Thus, where the thief was not able to carry off the goods he

¹ 4 Black. Com., 231; 2 East. P. C. 555; 3 Inst., 108; 1 Hawk. P. C., ch. 33, § 25.

² Simpson's Case, Kel., 31.

³ 1 Hawk., ch. 33, § 28.

⁴ R. v. Wallis, 12 Shaw's J. P., 236.

⁵ R. v. Pitman, 3 C. & P., 423.

⁶ Coslet's Case, 1 Leach, 236.

⁷ 1 Hale, 507; 3 Inst., 108.

⁸ R. v. White, 1 Dears' C. C. R., 203.

⁹ R. v. Gruncell, 9 C. & P., 365.

intended to steal from a shop, by reason of their being attached by a string to the counter.¹ So where the prisoner merely turned a bale on end where it lay, for the purpose of cutting it open and taking the goods out, and he was detected before he effected his purpose, this was holden not to be a sufficient asportation.² So, also, where a thief was prevented carrying off a purse on account of some keys attached to the string of it getting entangled in the owner's pocket.³

There must be an entire possession of the goods by the thief, though but for an instant. Thus, where the prisoner had taken a package, which laid lengthwise in a wagon, and set it upon end, and had cut the wrapper down for the purpose of taking out pieces of linen which it contained, and was apprehended and discovered before he had taken anything out, it was held no larceny; for the party accused must, for the instant at least, have the entire and absolute possession of the goods.⁴ But if every part of the thing is removed from the space that thing occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient.⁵ Thus, drawing a sword partly out of a scabbard is within the above rule.⁶ Also lifting a bag from the bottom of the boot of a coach and removing each part of it from the space which that specific part occupied, although the prisoner was detected before he got it out of the boot, was held larceny.⁷ But where a parcel was not removed, its position only being altered on the spot where it lay, the judges came to a different conclusion.⁸

4. *Of the Felonious Intent.*

The taking and carrying away must also be felonious, that is, done *animus furandi*, or, as the civil law expresses it, *lucri causa*.⁹

¹ 2 East. P. C., 556.

² R. v. Cherry, 2 East. P. C., 556.

³ R. v. Wilkinson, 1 Hale, 508; 2 East. P. C., 556.

⁴ 1 Leach, 236; 2 East. P. C., 556.

⁵ 2 Russ. on Cr., 6.

⁶ Id.

⁷ R. & M. C. C. R., 14.

⁸ 2 East, P. C., 556; 1 Leach, 236-237, note.

⁹ 4 Black. Com., 232; Inst., 4, 1, 1.

The point aimed at by these two expressions, *animo furandi* and *lucri causa*, the meaning of which has been much discussed, seems to be this: that the goods must be taken into the *possession* of the thief with the intention of depriving the owner of his *property* in them.¹

Thus, it has been held that, though in taking possession of the article the intention of the taker is to destroy it, and that he never contemplated any acquisition of the property himself, it is still larceny; because he intends to deprive the owner of his property. Thus where H was about to be tried for stealing a horse, and the prisoner, in order to screen H from conviction, clandestinely took the horse out of the prosecutor's stable, led him to a coal pit, and backed him into it, and the horse was killed, it was held to be larceny, and done with the intention to deprive the owner wholly of the property.² Also, where the prisoners, who were servants, clandestinely took their master's grain, with the intent of giving it to their master's horses, and without any intent of applying it to their own private benefit, it was first said this was larceny, because it was taken *lucri causa* (for the sake of gain), because the men's work was lessened by the additional food given to the horses, and so there was some sort of benefit to themselves.³ But in a later similar case,⁴ the rule was laid down as above stated, that their intention was *to deprive the owner of his property in the grain taken*.

A taking by mere accident, or in joke, or mistaking another's property for one's own, is neither legally or morally a crime.⁵ And where goods are delivered to a party by mistake, such party, having done no fraudulent act, in order to cause them to be so delivered, and such party afterwards disposes of them to his own use, this is not larceny, on the ground that there was no *animus furandi* at the time when the goods were delivered.⁶ But if a man leaves a plough or a harrow in a field, and another person who has land in the same field, uses those instruments, and having done with them, either returns them to the place where they were, or acquaints the owner with having taken them,

¹ Roscoe's Cr. Ev., 6th ed., 567.

² R. v. Cabbage, R. & Ry., 292.

³ Russ. & Ry., 307.

⁴ R. v. Privett, 1 Den. C. C., 193.

⁵ 2 Hale, 507-509.

⁶ R. v. Mucklow, Ry. & M., 160.

this is only a trespass, and not larceny.¹ So, also, where a man having cattle pasturing in a common, which he cannot readily find, takes his neighbor's horse, which is pasturing on the same common, rides about it to find his cattle, and when he has done with it, turns it again upon the common.² Also, where the defendant took a bird-cage, of trifling value, out of her neighbor's yard, through mischief only, held no larceny.³

If property is taken by mistake, arising from heedlessness or carelessness, it is no larceny; as if the sheep of A, stray from his flock to the flock of B, and B drove them along with his own flock, and by mistake, without knowing or taking heed of the difference, shear them, it is no larceny; although, if B knew them to be the sheep of another person, and tried to conceal that fact, if, for instance, finding another's mark upon them, he defaced it, and put his own marks upon them, it would be evidence of larceny.⁴

Where the prisoners took two horses from a stable, rode them to a place at a considerable distance, and there left them, proceeding on their journey on foot, and the jury having found that the horses were taken by the prisoners only to ride them, and afterwards to leave them, it was holden to be a trespass, and not a larceny.⁵ So, also, it was held where the prisoner stole other articles and at the same time took a horse to carry the articles away with, and subsequently turned the horse loose, it was said if the prisoner intended to steal the other articles only, using the horse as a method of carrying the other plunder more conveniently, he would not be in point of law guilty of stealing the horse.⁶

The prisoner was employed to melt pig iron in a furnace and paid according to the weight of the iron which ran out of the furnace; the prisoner placed the pig iron in the furnace, and with it an iron axle of his employer's which was not pig iron, thus increasing the quantity of metal which ran from the furnace, to the gain of the prisoner. The court held if the prisoner put the iron in the furnace with an intent to convert it to a purpose for his own use, it was larceny.⁷

¹ 4 Blac. Com., 232; 1 Hale, 509.

² 1 Hale, 509.

³ 1 City H. Rec., 177.

⁴ 1 Hale, 506-507.

⁵ 2 East. P. C., 662-663.

⁶ Rex v. Crump, 1 C. & P., 658.

⁷ R. v. Richards, 1 C. & K., 532.

Where the prisoner took some skins of leather, not with the intent to sell or dispose of them, but to bring them in and charge them as his own work, and get paid by his master for them, they having been dressed not by the prisoner but by another workman, it was held not to be a larceny.¹

The distinction between this case and the last seems to be that in the former case there was such a conversion of the goods to the prisoner's own purposes as that the master could never have them again in their original condition, whereas in the latter their condition was never altered. So, also, where the prisoners took a quantity of finished gloves out of a store room on the same premises, and laid them on the table with the intent fraudulently to obtain payment for them as so many gloves finished by them; held not larceny.²

But, where a servant took his master's goods and offered them for sale to the master himself, as the goods of another, he was held guilty of larceny, as it was clear he intended to assume the entire dominion over the goods.³

If the taking be not with intent wholly to deprive the owner of the property, it cannot be larceny. Thus, where the prisoner had clandestinely taken the articles alleged to be stolen, merely for the purpose of inducing a young girl, the owner of them, to call for them, and thereby giving him an opportunity of soliciting her to commit fornication with him, the judges held that this was not a felonious taking.⁴

Where the personal property of one is through inadvertance left in the possession of another, and the latter *animo furandi* conceals it, he is guilty of larceny. Knowing it to be the property of another, his possession will not protect him from the charge of felony.⁵

BLACKSTONE, in discussing the question of felonious intent, observes, "That the ordinary discovery of a felonious intent is where the party does it clandestinely, or being charged with the fact, denies it. But this is by no means the only criterion of criminality, for in cases that may amount to larceny, the variety

¹ R. v. Holliway, 1 Den. C. C., 381.

² R. v. Poole, Dear & B. C. C., 345.

³ R. v. Hall, 1 Den. C. S., 381.

⁴ R. v. Dickenson, R. & Ry., 420.

⁵ Peo. v. M'Garren, 19 Wend., 460.

of circumstances is so great and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animo furandi*, therefore they must be left to the due and attentive consideration of a court and jury."¹

An important feature to be distinguished in examining the question of larceny, is the rule, that the intention of depriving the owner of the goods taken of his *property* in them must exist at the time of the taking, and no that subsequent felonious intention will render the previous taking felonious.

Thus, where goods are removed by a prisoner during a fire, with intent to preserve them for the owner, and he afterwards determines to appropriate them to his own use, it was held no larceny.² Also, where a bailment is procured without any felonious intent on the part of the bailee, and he afterwards and before the determination of the bailment converts the property, this will not be larceny.³

Some difficulty has arisen, in certain cases of larceny, in discovering what the intention of the accused was at the time he obtained the possession of the goods. If the intention was originally fraudulent, then it was held larceny; if he was originally innocent, then he was held to be a bailee, and a subsequent fraudulent appropriation was not necessarily larceny. Thus, the rule was laid down in Charlewood's case, where the prisoner obtained a horse under pretence of hiring it to take a journey and afterwards sold it, that if it appeared to the jury that the prisoner, at the time he hired the horse for the purpose of going to B, really intended to go there, but that finding himself in possession of the horse he afterwards formed the intention of converting it to his own use instead of proceeding to the place which the horse was hired to go, it would not amount to a felonious taking.⁴ And in Pear's case, the jury were instructed to consider whether the prisoner hired the mare with the intention of taking the journey which he mentioned and afterwards changed his intention, and the court directed them, that, if they were of opinion that he did so they should acquit, as in such case the mare must have been

¹ 4 Black. Com., 232.

² 2 East. P. C., 694.

³ East. P. C., 594-837; R. & R. C. C., 441.

⁴ 1 Leach, 409; 2 East. P. C., 689.

sold while the privity of contract subsisted; but the directed to find the prisoner guilty in case they were of that the journey was a mere pretence of the prisoner's to mare into his possession, and that he hired her with the in of stealing her.¹

If a person gets possession of a horse by hiring, mea the time not to use it for the purpose for which he hired to endeavor to make it his own, the guilt or innocence party depends upon what passed in his mind at the ti this is to be inferred from circumstances; if you find that of going to the place where he stated he was going he we where, it raises a presumption that he meant to dep original possessor of the horse.²

The difficulty to be overcome in these cases, is to de whether the accused originally intended to take the p upon the contract and make use of that qualified posses whether he originally intended to convert it to his own us whether it was a bailment, or whether the transaction fell that class of cases where the owner of goods is induced b to part with the possession of them; but it is impossible there is an absence of any facts whatever at the time the took the possession of the property, showing what his in was at that time, for any person, judging from his sub acts, to say that such felonious intention was not forme poraneously with the commission of such subsequent acts, his original intention was *bona fide*, unless there be t fession of the prisoner himself to establish the fact; remarked by Lord HALE,³ "It is the mind that makes the of another's goods to be felony, or a bare trespass only ever, where there has been a subsequent sale or dispositio property, it would seem but a slight evidence of fraud co raneous with the hire or loan would be required to sh final felonious intention."

It has been held, that to constitute larceny by a party t goods have been delivered on hire, there must be not

¹ 1 Leach, 212; 2 East. P. C., 685. See also Armstrong's Case, 11 Vicar's Case, 1 Lew., 199; Major Semple's Case, 1 Leach, 420; 2 C., 691.

² Spencer's Case, 1 Lew., 197.

³ 1 Hale, 509.

original intention to convert them to his own use, but a subsequent actual conversion, and a mere agreement by the hirer to accept a sum offered for the goods is not such a conversion if the party who makes the offer does not intend to purchase, unless his suspicions, as to the honesty and right of the vendor to sell, are removed.¹ But the correctness of such decision has been questioned; for the acts of the prisoner subsequent to the time when he obtained possession of the chattel, are only material for the purpose of enabling the jury to decide what his intention was at the time of the taking.²

5. *Who may Commit the Offence.*

A man may be guilty of larceny in taking his own goods where they are in the possession of a bailee, and the taking of them will have the effect of charging him; for if a man deliver goods to a tailor or carrier, and afterwards, with intent to make him responsible for them, fraudulently and secretly take them away, he is guilty of larceny.³

A man may also steal his own property which has been levied on by an officer.⁴

For, as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant to support an indictment.⁵

There is another exception to the general rule that a person cannot commit larceny of goods wherein he has a property, besides the case of a man's stealing his own property which has been bailed to another, and that is where the part owner of property steals it from the custody of the person in whose custody it is, and who is responsible for its safety. Thus, it has been held that the member of a friendly society may commit larceny of a box, containing the funds of the society, from the person in whose custody it was kept.⁶ But it has been held that the wife of a member of a friendly society was not guilty of larceny in stealing the society's money.⁷

¹ Reg. v. Brooks, 8 C. & P., 295.

² See note to 2 Russ. on Cr., § 54.

³ 1 Hawk., ch. 33, § 47; Peo. v. Wiley, 3 Hill, 199.

⁴ Palmer v. Peo., 10 Wend., 165.

⁵ See Rex v. Deakin, 2 Leach, 871.

⁶ Russ. & Ry., 478.

⁷ Rex v. Willis, R. & M. C. C. R., 375.

A debtor, who having made an assignment for the benefit of creditor's, removes his goods before the trustee take possession, with intention to deprive his creditors of them, is not guilty of larceny.¹

The doctrine is laid down at common law that the wife cannot be guilty of larceny of the goods of her husband, except in those cases in which the husband himself might be guilty, as above stated, for they are in the law considered as one person.²

Where a stranger and the wife jointly steal the husband's property, whether it is larceny in the stranger has been differently held in the English cases, although in the later cases it has been said to be larceny, and in a recent case it was held that an indictment against the wife's adulterer for larceny of the husband's goods would be supported by evidence that the goods were delivered to the adulterer by the wife, he knowing at the time that she had taken them without the husband's authority.³

In this State it has been held that it is larceny for a man who elopes with another's wife to take his goods, though with the consent and at the solicitation of the wife.⁴

A deaf and dumb person may be convicted of larceny.⁵

A joint tenant or tenant in common of a personal chattel cannot be guilty of larceny by taking it and disposing of the whole of it to his own use. Thus: if A and B be joint tenants or tenants in common of a horse, and A take the horse, even *animo furandi*, yet it will not be larceny.⁶

6. *Of the Value of the Goods Taken.*

The value of the goods taken is necessary for the purpose of determining the grade of the offence, in order to regulate its punishment. Thus, except where goods are stolen from the person, it is necessary that their value should be twenty-five dollars in order to constitute grand larceny, and the larceny of goods less than twenty-five dollars in value, except when stolen from the person, is petit larceny.

¹ Reg. v. Pratt, 26 Eng. L. & Eq. R., 574.

² 1 Hale, 514.

³ Reg. v. Featherstone, 26 Eng. L. & Eq. R., 570. See 1 Moody C. C., 243; Id., 386; R. v. Tollett & another, Carr & M., 112.

⁴ Peo. v. Schuyler, 6 Cow., 572.

⁵ Com. v. Hill, 14 Mass., 207.

⁶ 1 Hale, 513; 2 East. P. C., 558.

Sir SAMUEL ROMILY, in his *Observations on the Criminal Law of England*, p. 65, says: "The latitude which jurors allow themselves in estimating the value of property stolen, with a view to the punishment which is to be the consequence of their verdict, is an evil of very great magnitude. Nothing can be more pernicious than that jurymen should think lightly of the important duties they are called upon to discharge, or should acquire a habit of trifling with the solemn oaths they take."

The common law rule was that evidence of some value must be given;¹ but that rule was questioned by PARKE, B. "At any rate," said that judge, "it need not be of the value of any coin known to the law."² Neither is it necessary that the property should be of value to third persons if valuable to the owner.³ In order to constitute the offence of larceny it is sufficient if the thing be of some value, however small.⁴ A defendant may be found guilty of petit larceny without proof of the value of the article stolen, when it is of any intrinsic worth.⁵

A warrant issued by a justice for the arrest of a person charged with larceny, which recites a distinct charge of larceny against the accused, is not rendered invalid by the omission of an allegation as to the value of the property stolen. The only effect of the omission is that the offence charged will be deemed petit larceny.⁶

The market value, and not the prime cost of goods, is the true criterion in determining the grade of larceny. So held where the market value was more than the cost and intrinsic value of the goods, viz., jewelry.⁷

In larceny of lottery tickets authorized by the laws of the State (of which there are none such at present), if stolen before drawing, the price paid shall be deemed their value; if stolen after drawing, the amount due and payable thereon is to be deemed their value.⁸

If the price authorized to be charged for a sale of railroad

¹ 2 Leach, 680.

² R. v. Morris, 9 C. & P., 349.

³ Payne v. The People, 6 John., 103.

⁴ Peo. v. Wiley, 3 Hill, 199.

⁵ State v. Slack, 1 Bailey, 330.

⁶ Payne v. Barnes, 5 Barb., 465.

⁷ Taylor's Case, 1 City H. Rec., 23.

⁸ 2 R. S., 679, § 69.

tickets stolen shall exceed twenty-five dollars, such price is deemed the value of them, and the offence is grand larceny; if such price shall only amount to twenty-five dollars or less, the offence is petit larceny.¹

The stealing of records, papers, or proceedings of a court of justice, or deposited in any public office, or with a judge or justice, is grand larceny, without reference to the value of the thing stolen.²

7. Of Principals and Accessories.

At common law all present aiding and abetting in the commission of this offence, were principals in the second degree.

In grand larceny there are accessories before and after the fact. Thus, a man may make himself an accessory after the fact in grand larceny of his own goods, by harboring or concealing the thief, or by assisting him in his escape.⁴ And so, also he may be an accessory before the fact in stealing his own goods, if he procures another to do so with a felonious design.⁵

An accessory to larceny, before or after the fact, cannot be indicted as principal.⁶ But in petit larceny there are no accessories, and all concerned in the commission of the offence are principals.⁷ Those who procure aid and advice are principals, and those who merely assist the prisoner's escape are not principals at common law regarded as criminals.⁸

One who sends another to commit petit larceny may be indicted as a principal, although the offence was committed in his absence. There are no accessories in petit larceny, on account of the smallness of the felony; all are principals.⁹ If the principal procure an innocent agent, as a child or a lunatic, to take property, he will himself be a principal offender.¹⁰ But if larceny is accomplished by means of an agent, the contractor is guilty as a principal, if he had a felonious intent, and the

¹ 2 R. S., 680, § 76.

² 2 R. S., 680, § 71.

³ 3 Chit. Cr. L., 950.

⁴ Fost., 123; 1 Russ. on Cr., 37.

⁵ Cro. Eliz., 537.

⁶ Norton v. Peo., 8 Cow., 137.

⁷ Ward v. The People, 3 Hill, 395.

⁸ 1 Hale, 530, 616.

⁹ Ward v. People, 6 Hill, 144.

¹⁰ 1 Hawk., ch. 33, § 12.

was wholly innocent; but if the agent was cognizant of the felonious intent, the contriver can be convicted only as an accessory before the fact.¹

Under the common law doctrine that larceny was committed in every county into which the thief carried the goods, it was said if two persons be guilty of a felonious taking in one county, and if one of them alone carry the property into another county, yet if the other afterwards concur with him in securing the possession, they may both be jointly indicted in the second county.²

So, if two jointly commit a larceny in one county, and one of them carry the stolen goods into another county, the other still accompanying him, without their ever being separated, they are both indictable in either county, the possession of one being the possession of both in each of the counties, so long as they continue in company.³

Where there is one continuing transaction, though there be several distinct asportations in law by several persons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods from the virtual custody of the owner.⁴

And if several persons act in concert to steal a man's goods, and he is induced by fear to trust one of them in the presence of the others with the possession of the goods, and another of them entice him away, so that the man who has the goods may carry them off, all are guilty of felony. The receipt by one is a felonious taking by all.⁵

Where several were acting together to steal privately in a shop, and some were in the shop and some out, and the property was stolen by one of those who were in the shop, those outside were held equally guilty as principals.⁶

And where property which the prosecutor had bought was weighed out in the presence of their clerk and delivered to their carter's servant to cart, who let other persons take away the cart and dispose of the property for his benefit, jointly with that of

¹ *Peo. v. McMurray*, 4 Park. Cr. R., 234.

² *Rex v. County, East. T.*, 1816. See *Com. v. Dewitt*, 10 Mass. R., 154.

³ *Rex v. M'Donogh*, Cow. Supp., 2d ed., 23.

⁴ 2 East. P. C., 557; *State v. Trexler*, 2 Car. Law Rep., 90.

⁵ *R. v. Standley et al.*, R. & R. Cr., ch. 305.

⁶ *Russ. & Ry. C. C.*, 343-421; *Ry. & Moo. C. C.*, 9f.

other persons, it was held that the carter's servant, as well as the other persons, was guilty of larceny at common law.¹

But, in an indictment for larceny, one cannot be convicted as a principal unless he was actually or constructively present at the taking and carrying away of the goods, his previous assent to or procurement of the caption and asportation will not make him a principal, nor will his subsequent reception of the thing stolen or his aiding in concealing or disposing of it have that effect.²

The knowingly receiving stolen goods does not make a man an accessory at common law unless he harbored and assisted the original offender; but, by our statute, knowingly receiving stolen goods is made a criminal offence, which will be hereafter considered.

8. *Larceny from the Person.*

Whenever any larceny shall be committed by stealing, taking and carrying away from the person of another, the offender may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars; and attempts, under similar circumstances, may be punished as for attempts to commit grand larceny.³

Under a similar English statute, the indictment did not negative force or fear, and the facts amounted to a clear case of robbery. The trial judge doubted whether he ought not to direct an acquittal and detain the prisoner to be indicted for robbery, but the judges, upon a review of the case, were unanimous that the indictment need not and ought not to negative force or fear, and that the existence of such force or fear was no answer to the charge.⁴

To constitute a stealing from the person the thing taken must be completely removed from the person; and where a pocket-book was drawn from a waistcoat pocket an inch above the top of the pocket, but immediately returned again into the pocket by the quick motion of the prosecutor's arm upon the hand and arm of the thief, it was argued that the prisoner was not rightly convicted of stealing from the person, because from first to last the

¹ *R. v. Harding*, R. & R. O. C., 125.

² *State v. Hardin*, 2 Dev. & Batt., 407.

³ Laws 1862, ch. 374, § 2.

⁴ *Rex v. Robinson*, Russ. & Ry., 321.

book remained about the person of the prosecutor, but the judges all agreed that the larceny was complete.¹

Under the act of 1860, applicable to the city and county of New York, which was similar in its terms to the act of 1862, above cited, and applicable to the whole State, it was held by the Court of Appeals that the word "may," in said act, was enabling and not mandatory, and that where an indictment under that act charged several sums, amounting to more than twenty-five dollars, the prisoner had an absolute right to have the jury instructed to find the amount of the sum stolen, and if the amount, as stated by the verdict, is under twenty-five dollars the court has discretion to pass sentence for petit larceny only.²

XXVIII. MAYHEM.

Mayhem was always an offence at common law. It was there defined to be a bodily hurt, whereby a man is rendered less able in fighting, to defend himself or annoy his adversary, therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhem. But the cutting off the ear, nose or the like would not, at common law, be mayhem, because the effect would be simply to disfigure, not to weaken.

Our statute declares that every person who from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with the intention to kill or commit any felony, shall, 1st. Cut out or disable the tongue; or, 2d. Put out an eye; or, 3d. Slit the lip, or slit or destroy the nose; or, 4th. Cut off or disable any limb or member of another on purpose, upon conviction, shall be imprisoned in a State prison.³

XXIX. MOCK AUCTIONS.

The Legislature of this State have enacted as follows:

"Whereas, a failure of justice frequently arises from the subtle distinction between larceny and fraud, and whereas, certain evil disposed persons, especially in the city of New York, have for several years past, by means of certain fraudulent and deceitful

¹ *Rex v. Thompson*, Ry. & Mood. C. C., 78.

² *Williams v. People*, 24 N. Y. R., 405.

³ 2 R. S., 664, § 29.

practices, known as mock auctions, most fraudulently great sums of money from unwary persons, to their great enrichment, each and every person who shall, through means of any other gross fraud or cheat at common law edly and with intent to defraud, obtain from any other any money, or any goods, wares, merchandise or other property or shall obtain, with such intent, the signature of any person in any written instrument, the false making whereof would be punishable as forgery, is guilty of a felony; provided always upon the trial of any person indicted for such fraud, it is proved that he obtained the property in question in any manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to an acquittal, and no person tried for such offence shall be liable to be afterwards prosecuted for larceny in respect of the same facts."¹

The above mentioned statute to prevent gross frauds in respect of mock auctions extends to no other frauds than those indictable at common law, except mock actions.²

XXX. MALICIOUS INJURY TO RAILROADS.

The Revised Statutes provide that every person who shall, with malicious intent, remove, break, displace, throw or destroy, any iron, wooden or other rail, or any branch ways, or any part of the tracks, or any bridge, culvert, embankment or other fixture, or any part thereof, or who shall do any act to or connected with such tracks of any railroad in then in operation at the time of the passage of the act, or who should thereafter be put in operation; or who shall do any act with like malicious intent, place any obstructions upon or tracks of such railroad, is guilty of a felony.³

But the preceding section is not to be so construed as to cases where death to a human being shall result from the commission of either of the offences mentioned in said section.

XXXI. PASSENGER TICKETS UPON STEAMBOATS AND OTHER

By the Laws of 1860, chapter 103, page 177, various provisions in relation to the making and vending of passenger tickets

¹ Laws 1853, ch. 138, § 1; 1 R. S., 535, §§ 58, 59.

² *Ranney v. Peo.*, 22 N. Y., 413.

³ 2 R. S., 689, § 21; Laws 1838, ch. 160, § 1.

⁴ *Id.*, § 22; *Id.*, § 2.

steamboats, steamships and other vessels, are made felonies. As the act is lengthy it is not deemed necessary to insert its provisions here.

XXXII. PRODUCING PRETENDED HEIR.

Every person who shall fraudulently produce an infant, falsely pretending it to have been born of parents whose child would be entitled to a share of any personal estate or to inherit any real estate, with the intent of intercepting the inheritance of any such real estate, or the distribution of any such personal property from any person lawfully entitled thereto, is guilty of a felony.¹

This offence divides itself into the following questions: First, Was it a fraudulent production of the child; Second, Did the defendant falsely pretend that it was born of certain parents; Third, Would a child of the parents of whom the defendant pretended it was born be entitled to inherit; Fourth, Was it the defendant's intention by the fraudulent production to intercept the inheritance.²

XXXIII. POISONING.

The following sections of our statute declare it to be felony to administer or expose poison in the cases therein mentioned. Of all the different modes by which death is effected, that by poison, willfully administered, may be considered as the most detestable; because it can of all others be least prevented by courage or forethought. The act itself necessarily implies the most cool and deliberate malice in the perpetrator, and no provocation is allowed to justify it. On account of its singular enormity, the English statute formerly made it treason, but it was subsequently made willful murder. The perpetrators of murder by poison were anciently punished more severely than the accomplishment of death by any other means; one sentence was to be boiled to death.³

(a) *Administering Poison to Human Beings.*—Every person who shall be convicted of having administered, or having caused and procured to be administered any poison to any other human being, with intent to kill such human being, and which shall

¹ 2 R. S., 676, § 53; 3 Park., 520.

² *Peo. v. Cunningham*, 3 Park., 527.

³ 1 East. P. C., 225.

have been actually taken by such being, whereof death shall not ensue, shall be punished by imprisonment in a State prison.¹

Where, upon an indictment for poisoning, it was proved that the prisoner administered two berries of the colocus indicus to a child of nine years old, with intent to murder it, it was proved that the kernel, which is a strong narcotic poison, is inclosed in a strong shell or pod, very difficult to break, which is innoxious; and that the digestive powers of a child of that age would not break or affect the pod, so as to allow the kernel to act; but that it would either be ejected from the stomach, or pass through such a child without harm, and in fact such was the case; one berry was thrown up and the other passed through without injury to the child. It was objected that, under these circumstances, the berries could not be deemed poison; for being in the pods they could not effect injury to any such child; the prisoner was convicted, and the question being reserved for the criminal appeal court, the judges held it sufficient that these berries were poison, and that they were administered with intent to kill, to bring the case within the statute and that the conviction was right.²

(b) *Exposing Poison to Cattle, etc.*—Every person who shall willfully administer any poison to any horse, cattle or sheep, or shall maliciously expose any poisonous substance, with intent that the same should be taken or swallowed by any horse, cattle, or sheep shall, upon conviction, be punished by imprisonment in a State prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.³

(c) *Poisoning Food, Springs, etc.*—Every person who shall mingle any poison with any food, drink or medicine, with intent to kill or injure any human being, or who shall willfully poison any spring, well or reservoir of water, is guilty of a felony.⁴

(d) *Administered by Physicians.*—The statute further declares that if any physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug or medicine, or do any other act to another person which shall pro-

¹ 2 R. S., 665, § 39.

² R. v. Claderoy, 1 Car. & K., 176; 1 Arch. Cr. P., 258.

³ 2 R. S., 689, § 16.

⁴ 2 R. S., 665, § 40.

duce the death of such other, he shall be deemed guilty of manslaughter.¹

XXXIV. PERJURY.

Lord COKE defined perjury at the common law to be a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely and falsely in a matter material to the issue or point in question.²

But by our Revised Statutes the offence is defined to be the willful and corrupt swearing, testifying or affirming falsely to any material matter upon any oath, affirmation or declaration legally administered.

1. In any matter, cause or proceeding depending in any court of law or equity, or before any officer thereof.

2. In any case where an oath or affirmation is required by law or is necessary for the prosecution or defence of any private right or for the ends of public justice.

3. In any matter or proceeding before any tribunal or officer created by the constitution or by law, or where any oath may be lawfully required by any judicial, executive or administrative officer.³

1. *Of the Oath.*

It is immaterial in what form the oath is administered, provided the party at the time professes such form to be binding on his conscience.⁴

An oath administered by mistake, *e. g.*, upon Watts' Psalms and Hymns instead of upon the Gospel, is a valid oath. If the party taking it makes no objection at the time, he is deemed to have assented to the particular form adopted, and is liable to perjury as if the oath had been regularly administered.⁵ The legal effect of an affirmation is the same as that of an oath.⁶

¹ 2 R. S., 662, § 17. For other cases of administering poison, see "Misdemeanors," post.; for history of the art of poisoning, see 1 Beekman's History of Inventions, p. 74, *et seq.*; for characteristics and symptoms of different poisons, see Wharton & Stele's Medical Jurisprudence.

² 3 Inst., 164.

³ 2 R. S., 681, § 1.

⁴ Com. v. Knight, 12 Mass., 274; Campbell v. The Peo., 8 Wend., 636; 2 Hawks., 458; 2 Rob., 795; 1 Rob., 729; 2 Murphy, 320; 3 Id., 153.

⁵ Peo. v. Cook, 4 Seld., 67.

⁶ Pendergrast's case, 2 City H. Rec., 11.

2. *Before a Person Authorized to Administer an Oath.*

The oath must be taken before a person having competent authority to administer it, otherwise the false statement would be no offence.¹ Therefore, no false swearing before individuals acting merely in a private capacity, or before officers who have no legal jurisdiction to administer the particular oath in question will amount to the offence of perjury.² And although the officer stands colorably in the situation which confers a power of receiving an oath on such an occasion, if in fact he is not duly appointed the proceedings will be of no avail.³ For though it is sufficient *prima facie* to show the ostensible capacity in which he acted when the oath was taken, the presumption may be rebutted by other evidence, and the defendant if he succeed will be entitled to an acquittal.⁴

Perjury cannot be committed by taking a false oath in a case before a justice of the peace of which the justice has not jurisdiction.⁵ Perjury may be assigned upon a false oath taken before a grand jury.⁶ No indictment for perjury will lie in one State for a false oath administered in another. A judge in New York has no authority to administer an oath in Canada.⁷

The general rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.⁸

A mere voluntary oath is not perjury. Thus, perjury cannot be assigned of a false oath to a protest taken before a notary public, as part of the preliminary proofs in case of a marine loss. The oath in such a case is a voluntary and extra-judicial proceeding.⁹ So no breach of an oath made in a mere private concern as in entering into a contract, however malicious, is an indictable

¹ 1 Hawk., ch. 59, § 4.

² 3 Inst., 166.

³ Id.; 3 Camp., 432.

⁴ 3 Camp., 432.

⁵ State v. Alexander, 4 Hawks., 182; State v. Furlong, 26 Maine, 69.

⁶ State v. Fassett, 16 Conn., 457; 2 R. S., 725, § 31.

⁷ Jackson v. Humphrey, 1 John., 167.

⁸ 1 Saund., 74, Bac. Abr., tit. Pleas, E. 1.

⁹ Peo. v. Travis, 4 Park. Cr. R., 213.

offence.¹ Perjury can only be assigned of testimony given before a competent tribunal or officer, and the defendant may show that the alleged tribunal or officer was neither *de facto* or *de jure* such officer.² Where the court is not regularly constituted, as where a judge of the county court sits in the court of sessions in a case not provided by law, an oath is not lawful, and the violation is not perjury.³

3. *The Oath must be False.*

With respect to the falsity of the oath, it should be observed that it has not been considered to be material whether the fact which is sworn be in itself true or false, for however the thing sworn may happen to prove agreeable to the truth; yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he willfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavors to induce those before whom he swears to proceed upon the credit of a deposition which any stranger might make as well as he.⁴ Thus, where a person testifies to what is true in fact, but at the time he testifies does not know it to be true, and has no knowledge on the subject, if such testimony be material and the act willfully committed, such person is guilty of perjury.⁵ It is enough, if the oath was false in one particular point, material.⁶

4. *Of the Materiality of the Statement.*

As a general rule, it may be laid down that the statement must be in some point material to the question in dispute.⁷ For if the subject-matter is entirely foreign to the purpose, not tending either to extenuate or increase the damages or the guilt, nor likely to induce the jury to give a more easy credit to the substantial part of the evidence, the party will not be liable to indictment.⁸ It was said that, though a man swear falsely, yet if it be in a

¹ 3 Inst., 166; 11 Co. Rep., 98.

² *Peo. v. Albertson*, 8 How. Pr., 363.

³ *Peo. v. Tracy*, 9 Wend., 265.

⁴ 2 Russ on Cr., 597; 1 Hawk., ch. 69, § 6.

⁵ *Peo. v. McKinney*, 3 Park. Cr. R., 510.

⁶ *Tomlinson's Case*, 4 City H. Rec., 125.

⁷ 4 Bla. Com., 137; 3 Inst., 167; 1 Hawk. ch. 69, § 8.

⁸ 1 Hawk., ch. 69, § 8. See 12 Mass. 274.

matter immaterial to the issue, it will not amount to corrupt perjury; for the reason that perjury is so high a crime is in respect to the injury it does to man; but if it is not material to the issue, it cannot by any means induce the jury to give their verdict one way or the other, and consequently cannot injure the party against whom the verdict is given.¹

Thus, where a witness was asked whether a certain sum was paid for two things in controversy between the parties, and he said it was, whereas it was paid for one of them only, but it was immaterial in the case whether it was paid for one or both, it was holden not to be perjury.² So where a witness swore that the defendant drew his dagger and beat and wounded J. S., whereas he beat and wounded him with a staff, this was holden not to be perjury.³ So where a witness introduces his evidence with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts, it is not perjury.⁴

In an answer in chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied upon the statute of frauds (the agreement not being in writing), and had also denied ever having entered into such an agreement, and upon this denial he was indicted, it was held, that the denial of an agreement which by the statute of frauds was not binding on the parties, was immaterial and irrelevant, and not indictable.⁵ But it was held by the Court of Appeals of this State that false swearing to a promise within the statute of frauds is perjury, where no objection is made to the competency of such evidence.⁶ So in general where the witness answers the substance of the question truly, he cannot be indicted for perjury if through inadvertance he err in his statement of a circumstance attending it which is not material.⁷ But to swear falsely as to the character of a witness is sufficiently material.⁸ And in general it is said it is sufficient

¹ *Rex v. Griepe*, 1 Ld. Raym., 256; 3 Inst., 164; 2 Rolle Rep., 369.

² 1 Hawk., ch. 69, § 8.

³ Id.

⁴ *Rex v. Griepe*; 1 Ld. Raym., 256.

⁵ 1 Ry. & M., 109.

⁶ *Howard v. Sexton*, 4 Com., 157.

⁷ 1 Hawk., ch. 69, § 8.

⁸ Com. Rep., 43.

if the matter be circumstantially material to the issue or affect the ultimate decision.¹ There is no necessity that the false evidence should be sufficient to render the party on whose behalf it is given successful, but it will suffice if that is its evident tendency.² Or if in a civil action it has the effect of increasing or extenuating the damages.³ Still, however, if a question to such a circumstance be put to him in cross-examination, to sift him as to his knowledge of the substantial part, and he swear falsely, it is deemed material and perjury.⁴ So questions put to a witness in cross-examination for the purpose of testing his credit may be deemed material, whether they have a tendency to prove the issue or not.⁵ For where the scope of the question was to sift the witness as to his knowledge of the substance by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appear to be false, he is guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence than his appearing to have an exact and particular knowledge of all the circumstances relating to it.⁶ Perjury may be committed in swearing that the defendant's account sued upon is just and true, and that to the best of his knowledge and belief no part has been paid.⁷

On an oath erroneously taken, *e. g.*, an oath of a party in interest, when the magistrate should have taken that of some other person, perjury may be assigned, especially while the proceedings in which it was taken remain unreversed.⁸

A witness who testifies falsely as to a material fact is guilty of perjury, irrespective of the question whether he was a competent witness in the case; even though he was especially inadmissible to prove the particular fact to which he testified.⁹

A witness testifying falsely as to a material fact is guilty of perjury, though he were not a competent witness in the case.¹⁰

¹ 1 *Ld. Raym.*, 258; 2 *Id.*, 889; 2 *Rolle R.*, 369.

² 2 *Ld. Raym.* 889.

³ *Wood's Inst.*, 435.

⁴ *Id.*

⁵ 1 *Hawk.*, ch. 69, § 8; *R. v. Overton*, *Car. & M.*, 655.

⁶ 1 *Hawk. P. C.*, ch. 69, § 8.

⁷ *Patrick v. Smoke*, 3 *Strobh.*, 147.

⁸ *Van Steenburgh v. Kortz*, 10 *John.*, 167.

⁹ *Chamberlain v. The Peo.*, 23 *N. Y.*, 85.

¹⁰ *Id.*

5. *The Perjury must be Corrupt and Willful.*

BLACKSTONE says the perjury must also be corrupt (that is, committed *malo animo*), willful, positive and absolute.¹

If a man swears that he believes that to be true which he knows to be false, he swears as absolutely and is as criminal, in point of law, as if he had made a positive assertion that the fact was as he swore he believed it to be.²

Where a person testifies to what is true in fact, but, at the time he testifies, does not know it to be true, and has no knowledge on the subject, if such testimony be material and the act willfully committed, such person is guilty of perjury, and may be convicted under an indictment in the ordinary form.³ But if a man swear falsely from inadvertence or mistake it is no perjury.⁴ For the false oath must be willful, and taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury; which is, of all crimes whatsoever, the most infamous and detestable.⁵

It is perjury where one swears willfully, absolutely and falsely to a matter which he believes, if he has no probable cause for believing.⁶ If a person know that a fact exists, but state on oath, knowingly and with an intention to mislead, "that if the fact is so he does not know it," he will be guilty of perjury, and will be considered equally guilty as if he swore absolutely that the fact did not exist.⁷

It is no defence to an indictment for perjury that the prisoner was intoxicated.⁸

6. *In a Judicial Proceeding.*

At the common law it was said, that the law takes no notice of any perjury but such as is committed in some court of justice

¹ 4 Blac. Com., 137.

² 3 Wils., 427; 2 Bla. R., 881; 1 Leach, 242; 1 Hawk., ch. 39, § 7, n. a.

³ Peo. v. McKinney, 3 Park. Cr. R., 510.

⁴ 2 Hawk., ch. 69, § 2.

⁵ 1 Hawk. P. C., 69, § 2; U. S. v. Conner, 3 McLean's R., 573.

⁶ Com. v. Cornish, 6 Binney, 249.

⁷ Wilson v. Nations, 5 Yerg., 211. ⁸ Peo. v. Wiley, 2 Park. Cr. R., 19.

having power to administer an oath, or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution; for it esteems all other oaths unnecessary at least, and, therefore, will not punish the breach of them.¹ And it was further said, that it was not material whether the court, in which the false oath was taken, be a court of record or not, or whether it be a court of common law, or a court of equity or civil law, etc., or whether the oath be taken in the face of the court or out of it, before persons authorized to examine a matter depending in it, as before the sheriff, on a writ of inquiry; or whether it be taken in relation to the merits of a cause, or in a collateral matter, as where one, who offers himself as bail for another, swears that his substance is greater than it is.²

It will be observed, however, that the Revised Statutes provide that perjury may be committed in any case where an oath or affirmation is required by law or is necessary for the prosecution or defence of any private right, or for the ends of public justice; and by the provisions of the other sections of the same statute, cited above, the judicial proceedings in which perjury may be committed are as ample and complete as at the common law.³

The common law embraced only cases in which the false testimony was given in a judicial proceeding, but the provisions of our statutes are a considerable extension of the common law definition; hence many of the English common law cases which hold that the false swearing was not perjury, because not committed strictly within a judicial proceeding, are inapplicable under the provisions of our statute.

The commissioners of the penal code, in their report, presented to the Legislature of this State in 1864, take this view of the question, and state that the enlarged definition given by the Revised Statutes appears to have been overlooked by subsequent Legislatures, for a practice has grown up of making express provision in statutes, authorizing any new mode of investigation or enquiry, that false testimony given under the statute shall be perjury.

¹ 4 Blac. Com., 137.

² 1 Hawk. ch. 69, § 3; 2 Russ. on Cr., 598.

³ 2 R. S., 681, § 1; sub. 2.

The following are the leading instances of such provisions:

Laws of 1829, ch. 368, § 9.—This act authorizes the canal board to subpoena witnesses, to be examined before them, when the interests of the State require it; and section 9 declares willful false swearing before the board to be perjury.

Laws of 1834, ch. 201, § 7.—This act authorizes an examination to be instituted by the superintendent of the Onondaga salt springs, and the section cited declares false swearing upon such examination to be perjury. In the latter act, concerning the salt springs (*Laws of 1859, ch. 346*), an examination is authorized as in the act of 1834, ch. 201, but the unnecessary provision, declaring false swearing perjury, is omitted.

Laws of 1837, ch. 150, § 42.—This statute relates to the powers and duties of the commissioners for loaning United States moneys, and directs the manner in which they shall execute their trust. The section cited prescribes that "if any person shall falsely swear or affirm in any of the cases where an oath or affirmation is required to be taken by this act, or shall willfully and knowingly act contrary to any oath or affirmation he has taken in pursuance of the act, such offence shall be deemed to be perjury.

Laws of 1837, ch. 430, § 8, declares a party to the record who swears falsely upon the examination authorized by the usury act, guilty of perjury.

Laws of 1842, ch. 130, tit. vii., § 1.—This is the statute regulating elections. After providing that when any person offering to vote is challenged, the inspectors shall tender to him an oath to answer fully and truly, and shall then put certain questions the act declares false swearing on such examination to be perjury.

Laws of 1839, ch. 389, § 1 (repealed by the act of 1842, above cited), had a provision of the same purport.

Laws of 1843, ch. 57, § 4; Laws of 1855, ch. 20, § 4.—These acts authorize chairmen of committees of common councils, etc., to administer oaths to witnesses brought before such committees, and declare any false swearing in testimony so taken to be perjury.

Laws of 1849, ch. 115, § 19.—This statute makes it the duty of clerks of Erie county to render periodical accounts of official fees and disbursements, the correctness of which must be verified by affidavit. . Section 19 declares every person who shall will-

fully swear falsely in verifying any such account guilty of perjury.

Laws of 1854, ch. 332, § 8.—This declares willful false swearing to any oath or affidavit which may be lawfully required by any rules and regulations of certain canal officers to be perjury.

Laws of 1854, ch. 398, tit. iii., § 3.—This act provided for an enrollment of the militia, and authorized any person who claimed exemption from duty to file an affidavit of the facts, as the basis of an examination of his claim to be made by the assessors; and the section cited declares that to swear falsely in such affidavit is perjury.

Laws of 1859, ch. 44, tit. iv., § 6.—This section authorizes the trustees of the village of Monrovia to examine on oath any property owner claiming a reduction of taxes, and declares willful false swearing on such examination to be perjury.

Laws of 1859, ch. 380, §§ 13, 14.—This is the registry act for the city of New York. It authorizes certain questions to be put to electors under oath by inspectors of election and by the board of registration. The section cited declares false swearing perjury.

Laws of 1859, ch. 470, § 7.—This statute provides for the sale of certain lands belonging to the State, and directs officers therein named to file reports verified by affidavits. Section 7 makes all false swearing, under any of the provisions of the act, perjury.

Laws of 1860, ch. 259, § 25.—The statute is amendatory of the Metropolitan Police Commissioners' act. The twenty-fifth section, after empowering the board of Metropolitan Police Commissioners to subpoena witnesses, etc., declares false swearing by a witness upon any necessary proceeding under the regulations established by the commissioners, perjury.

Laws of 1860, ch. 465, § 4, declares witnesses testifying falsely before the commissioners appointed to ascertain and collect the damages caused by destruction of property at quarantine grounds, on Staten Island, in September, 1858, guilty of perjury.

Laws of 1863, ch. 90, § 15.—The act, which is for the protection and improvement of the Tonawanda band of Seneca Indians, authorizes oaths to be administered for several purposes, and provides in section 15 that willful false swearing by any person to whom any oath may be administered according to the act shall be deemed perjury.

Laws of 1864, ch. 253, § 9, provides for the punishment of taking false oaths under the soldiers' voting act.

By force of the definition of perjury contained in the Revised Statutes, false swearing upon the examination, authorized by either of the above mentioned statutes, would have been punished as perjury, without any express provision to that effect in the statute authorizing the proceeding.¹

Perjury may be committed by a witness in a statute arbitration, although the arbitrators were not sworn pursuant to the statute; their oath being waived by the parties.² If after a witness is sworn before arbitrators, and new parties and subjects of controversy are added by submission, it is a different cause, and it is not perjury, without a new oath, to testify falsely.³ Informalities in the mode of referring an action were held immaterial on an indictment for perjury, committed in giving false testimony before the referee.⁴

Perjury may be committed in an affidavit made for the purpose of procuring a process, *e. g.*, a certiorari, though the particular case made is one in which the issue of the process is prohibited.⁵ Perjury may also be committed upon the examination of bail, as to their competency.⁶

7. Evidence of One Witness not Sufficient to Procure Conviction.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury, as in such case there would be only one oath against another.⁷ But this rule must not be understood as establishing that two witnesses are necessary to disprove the fact sworn to by the defendant, for if any other material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction.⁸

So if there be only one witness, circumstances strongly corroborative are enough, although not in themselves sufficient to prove a

¹ Rep. Coms. of Penal Code, p. 49.

² 1 Den., 440; *Howard v. Sexton*, 4 Com., 157.

³ *Bullock v. Koon*, 4 Wend., 531.

⁴ *Peo. v. McGinnis*, 1 Park. Cr., 387.

⁵ *Pratt v. Price*, 11 Wend., 127.

⁶ *Tomlinson's Case*, 4 City H. Rec., 125.

⁷ 4 Blac. Com., 358; 1 Phil. on Evidence, 151; *Reg. v. Muscot*, 10 Mod., 193.

⁸ *Rex v. Leewich*, 6 Geo., 3; 1 Phil. on Evidence, 152, 7th ed.

fact.¹ But where there is only one direct witness, the evidence should be strong to confirm that witness in order to warrant a conviction.²

8. *Persons Convicted of Perjury Incompetent as Witnesses.*

A person who, upon conviction, shall be adjudged guilty of perjury, shall not thereafter be received as a witness, to be sworn in any matter or cause whatever, until the judgment against him be reversed.³ The same rule applies upon a conviction for subornation of perjury.⁴ And a person convicted of perjury is an incompetent witness, though he has been pardoned by the Governor and the pardon purports to restore him to all his civil rights, the Legislature having provided that such convict shall not be received as a witness till such judgment be reversed. Such incapacity to testify is a rule of evidence, and not a punishment of the offence.⁵

9. *Courts to Commit for Perjury.*

Whenever it shall appear to any court of record that any witness or party, who has been legally sworn and examined in any cause, matter or proceeding pending before such court, has testified in such manner as to induce a reasonable presumption that he has willfully and corruptly testified falsely to some material point or matter, such court may immediately commit such party or witness, by an order or process for that purpose, to prison, or take recognizance, with sureties, for his appearing and answering to an indictment for such perjury.⁶ Such court shall thereupon bind over the witnesses to establish such perjury to appear at the proper court to testify before the grand jury and on the trial, in case an indictment be found for such perjury, and shall also cause such immediate notice of such commitment or recognizance, with the names of the witnesses so bound over, to be given to the district attorney of the county.⁷ If, on the hearing of such cause, matter or proceeding in which such perjury

¹ 6 Cowen, 118, Suth., J.

² Reg v. Yates, 1 C. & Mars., 132.

³ 2 R. S., 681, § 1, sub. 3.

⁴ Id., § 4.

⁵ Houghtaling v. Kelderhouse, 1 Park. Cr. R., 241.

⁶ 2 R. S., 681, § 5.

⁷ Id., § 6.

shall have been suspected to have been committed, any papers or documents produced by either party shall be deemed necessary to be used in the prosecution for such perjury, such court may by order detain such papers or documents from the party producing them, and direct them to be delivered to the district attorney.¹

XXXV. RAPE.

HAWKINS defines rape to be the having carnal knowledge of a woman by force and against her will.² BLACKSTONE says the rape is an offence against the female part of his majesty's subjects but attended with greater aggravation than that of forcible marriage, and is the crime of carnal knowledge of a woman, forcibly and against her will.³ EAST defines the offence to be the unlawful carnal knowledge of a woman by force and against her will.⁴

Lord HALE says, "That rape is a most detestable crime, and therefore, ought to be severely and impartially punished with death; but, it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." He then mentions two remarkable cases of malicious prosecution for this crime that had come to his knowledge, and among them one case where, although the rape was fully sworn, it turned out, upon inspection, to be physically impossible that the party accused could have been guilty of the offence, and concludes: "I mention these instances that we may be the more cautious upon trial of offences of this nature, whenever the court and jury may, with so much ease, be imposed upon without great care and vigilance the heinousness of the offence many times transporting the judge and jury with so much indignation that they are, over hastily carried to the conviction of the person accused thereof by the confident testimony of malicious and false witnesses."⁵

1. *The Statutory Offence.*

The New York statutes do not prescribe any formal definition of rape, but provide that persons shall be punished who shall be convicted of rape:

¹ 2 R. S., 681, § 7.

² Ch. 41, § 2.

³ 4 Bla. Com., § 210.

⁴ 1 East. P. C., ch. 4, § 34.

⁵ 1 Hale, 635.

1. By carnally and unlawfully knowing any female child under the age of ten years; or,

2. By forcibly ravishing any woman of the age of ten years or upwards.¹

Another section of the same statute provides, that every person who shall have carnal knowledge of any woman above the age of ten years, without her consent, by administering to her any substance or liquid, which shall produce such stupor or imbecility of mind, or weakness of body as to prevent effectual resistance, shall, upon conviction, be punished by imprisonment in a State prison.²

2. *By Whom the Offence may be Committed.*

By the English common law, a boy under the age of fourteen years was supposed incapable of committing a rape, and, therefore, he could neither be convicted of the offence, nor of an assault with intent to commit it. In other felonies, *malitia supplet aetatem*; yet as to this particular species of felony the law supposes an imbecility of body as well as of mind.³ It has been said that this rule was established in ancient times in favor of life, on account of the punishment for rape being death.

In the *People v. Randolph*, GREEN, J., says: "The proposition is neither disputed nor disputable that by the common law of England, as it has been settled for several centuries, a person under fourteen years of age is conclusively presumed to be incapable of committing the crime of rape. The jury have found that, at the time laid in the indictment, the prisoner was under that age and have convicted him of this crime, and the question arises, is the rule above stated a part of the law of this State? It was held, in 14 Ohio R., 222, that the rule, as administered in England, was not applicable in that State, and that the presumption that an infant, under fourteen years of age, was incapable of committing a rape might be rebutted by proof that he had arrived at puberty. I agree entirely with the learned judge, who delivered the opinion of the court in that case, as to the soundness of the rule laid down by him."⁴

¹ 2 R. S., 663, § 22.

² Id., § 23.

³ 4 Blac., 212; *R. v. Aldershow*, 3 C. & P., 396; 1 Hale, 630.

⁴ 2 Park., 176.

The husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given and which she cannot retract.¹ In the case of a forcible marriage and abduction, where the party had afterwards carnal knowledge of the woman by force, it was holden that the offender could not be convicted of rape, unless the marriage was first legally dissolved; but that when the marriage was made void, *ab initio*, by a declaratory sentence in the ecclesiastical court, the offence then became punishable as if there had been no marriage.²

3. *Of the force Used by the Offender and the Resistance to be Made by the Prosecutrix.*

Under our statute, as has already been seen, where the woman is of the age of ten years or upwards, it is essential that the ravishing should be forcibly done in order to constitute the statutory offence, and it ought to appear that there was the utmost reluctance and resistance upon the part of the prosecutrix. In the *People v. Morrison*, HARRIS, J., says: "To constitute the crime for which the defendant was tried there must be an unlawful and carnal knowledge of a woman *by force and against her will*. There must be the utmost *reluctance* and the utmost *resistance*. It was well said by COWEN, J., in the *People v. Abbott* (19 Wend. 192), 'A mixed case will not do. The connection must be absolutely against the will.' In this case there was no great inequality of strength between the parties. The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her feet and hands with which she could kick and strike, teeth to bite and a voice to cry out. All these should have been put in requisition in defence of her chastity. I cannot see that anything like this was done. The girl herself does not pretend that she made any physical resistance, and according to her own account the only outcry she made was after the offence had been committed. No marks of violence were left upon her person, and she did not disclose what had occurred until several days after. Upon a state of facts like these, I cannot concur with the jury in pronouncing the defendant guilty of a rape."³

¹ 1 Hale, 629.

² *Id.*, 630.

³ 1 Park., 644.

the offence of rape may be committed, though the woman at-
 tended to the violence, if such, her consent was forced by
 death or by duress.¹ If non-resistance on the part of the
 victim proceeds merely from her being overpowered by
 force, or from her not being able from want of strength
 to resist any longer, or from the number of persons attacking
 her considered resistance dangerous and absolutely useless,
 the crime is complete.² And it will not be any excuse that she
 was first taken with her own consent, if she were afterwards
 forced against her will; nor will it be an excuse that she con-
 sidered after the fact, or that she was a common strumpet or the
 victim of the ravisher, for she is still under the protection of
 law and may not be forced.³ Circumstances of this kind,
 however, though they do not necessarily prevent the offence from
 amounting to a rape, yet are material to be left to the jury in
 cases of the party accused, especially in doubtful cases.⁴

There is much less danger of an unjust conviction in cases
 where the testimony of the principal witness is wholly fabricated
 than in cases where there can be no doubt that the accuser and
 accused were improperly together, and the only controverted
 question is whether the connection was brought about by mere

In such cases, although the woman never said "Yes;"
 more, although she constantly said "No," and kept up a
 pretence of resistance to the last, it may still be that she
 more than half consented to the ravishment. Her negative may
 have been so irresolute and undecided, and she may have made
 a feeble fight as was calculated to encourage rather than repel
 attack. And yet a sense of shame arising either from an
 apprehension of the consequences which may follow the illicit
 action, or from the fact that the matter has already become
 known to others, may stimulate the woman to call that a rape
 which was in truth a sin of a much less odious character. And
 once she has given the transaction a name, she has no alter-
 native but to confess herself false as well as guilty, or to go into
 a law-suit and arraign the supposed offender. And then, as there is
 no express consent, she is enabled to swear to the force without

East. P. C., 444; 1 Hawk. P. C., ch. 41, § 6.

Ex v. Hollett, 9 C. & P., 748.

Blac. Com., 213; 1 East. P. C., 445; 1 Hawk. P. C., ch. 41, § 7.

East. P. C., 445.

any such great stretch of conscience as would be necessary where the whole story was a tissue of falsehood from beginning to end. Cases of this kind do not call for any relaxation of the rules of evidence for the purpose of supporting the accusation. On the contrary, courts and juries cannot well be too cautious in scrutinizing the testimony of the complaining witness, and guarding themselves against the influence of those indignant feelings which are so naturally excited by the enormity of the alleged offence. Although no unreasonable suspicion should be indulged in against the accuser, and no sympathy should be felt for the accused if guilty, there is much greater danger that injustice may be done to the defendant in cases of this kind than there is in prosecutions of any other character. The evidence, if it amounts to anything, is always direct, and whatever may be the just force of countervailing circumstances, honest and unsuspecting jurors may think themselves bound of necessity to credit that which is positively sworn, especially if the witness is supported by proof of good character.¹

*4. When the Offence is Committed by Stratagem or Fraud,
Whether it shall be Construed to Mean Force.*

The question has several times been discussed, whether the having carnal knowledge of a married woman, under circumstances which induce her to believe it to be her husband, amounts to a rape?

In *Rex v. Jackson*, upon the case reserved, four of the judges thought that the having carnal knowledge of a woman while she was under the belief of its being her husband would be a rape, but the other eight judges thought that it would not.²

In two other English cases it was held that if a man gets into bed with a married woman, and by fraud has connection with her, she believing him to be her husband, and therefore consenting to the connection, it is not a rape.

On an indictment for a rape it appeared that the prosecutrix and her husband had gone to bed, and that she soon fell asleep, with her back towards her husband, and that afterwards she was awoke by feeling a hand pass around her, which turned her round, and she, supposing it to be her husband, made no resist-

¹ *Bronson, J., Peo. v. Hulse, 3 Hill, 316.*

² *Tr. T., 182; R. & Ry., 487.*

ance to that or to the connection which immediately followed; but that while the connection was going on she perceived by the person's breathing that it was not her husband, and immediately pushed him off her. The husband, having taken physic, had been obliged to go down stairs, where he was a quarter of an hour. GURNEY, B., in summing up, said: "I am bound to tell you that the evidence in this case does not establish the charge contained in this indictment, as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband."¹

In another case it appeared from the evidence of the prosecutrix that the person had got into her bed while she was asleep, and that she had permitted him to have connection with her, believing him to be her husband, and she did not discover who he was until after the connection was over. ALDERSON, B., said: "That puts an end to the capital part of the charge."²

In this State, in the case of *The People v. Bartow*, the prosecutrix, who was abed and asleep, was awakened by a man whom she supposed to be her husband in the very act of sexual connection. He remained in bed some time (about half an hour), when her daughter, who was about nineteen years of age, came into the room, and, after lighting a candle, exclaimed to her mother, who was still lying on the bed with the prisoner, "Get up, mother! Get up man!" The prosecutrix immediately got up, as well as the prisoner, and seizing him, struck him and ordered him out of the house. The court said the defendant had obtained possession of the person of the prosecutrix, according to her account, by fraud, and used no force, which was a necessary ingredient in the legal definition of a rape.³

In a note to the above case the reporter says: "Since this trial we have been informed that Chief Justice THOMPSON, at a court of oyer and terminer in Albany, a few months previous to his leaving the bench, ruled that force was not necessary to the commission of a rape, but that stratagem might be used to supply its place, and in a case of a similar character so charged the jury."

Whether rape existed when a medical man who had sexual

¹ *Rex v. Saunder*, 8 C. & P., 265.

² *Rex v. Williams*, 8 C. & P., 286. Vide 29 Eng. Law & Exqr. R., 592.

³ 1 Whee. Cr. Cas., 378.

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connection with a young girl, who made no resistance solely from a *bona fide* belief that the defendant was (as he represented) treating her medicinally, was the subject of much discussion in an English case. WILDE, C. J., said: "I can entertain no doubt whatever in this case. To my mind it is perfectly clear that the prisoner has been properly convicted." The recorder told the jury that the girl was of age to consent, and that if they thought she had consented to what the prisoner had done, they ought to acquit the prisoner; but if they were of opinion that she was ignorant of the nature of the prisoner's act, and made no resistance solely from the belief that she was submitting to medical treatment, they ought to find him guilty.¹

The provisions of our statute above referred to, where the carnal knowledge is provided by means of any substance or liquid, is analogous in principle, to the cases cited, where the connexion is had by means of stratagem or fraud. It would seem that the better reasoning is that where non-resistance proceeds from being overpowered by sleep, and consequent inability to make physical resistance, the offence should be considered complete, and that the person complained of, having used sufficient physical power in cases of this character to accomplish his purpose, should be considered in law, as having used force, within the meaning of the statute.

Is not the question involved, similar to the question in cases of assault with intent to commit the offence upon children under ten years of age, where it has been held that mere submission, by no means involves consent, and is not non-resistance in cases of sleep, to be regarded as involuntary submission? as where the prisoner gave the prosecutrix liquor for the purpose of exciting her, but not with the intention of rendering her insensible, and then having sexual intercourse with her, but while she was in a state of insensibility, thus produced, he took advantage of it, and violated her, the fifteen judges held that he was properly convicted of rape.²

5. Of Carnal Knowledge.

At common law, it was a vexed question whether there should be *emissio seminis*, in order to constitute the crime of rape; and in a case tried several years ago at the Albany Circuit, before Judge

¹ R. v. Case, 1 Eng. R., 544.

² Reg v. Camplin, 1 Car. & Kir., 746.

PLATT, he decided that both penetration and emission were necessary to constitute the offence.¹ The nice distinctions, however, which have been raised in regard to emission, and the question whether penetration was prima facie evidence of emission, have been settled by a provision of the Revised Statutes,² which enact that proof of actual penetration into the body, shall be sufficient to sustain an indictment for rape. But a very slight penetration is sufficient, even though it may not be attended with the deprivation of the marks of virginity.³

Before the passage of our statute, it was said, that it is not necessary in order to complete the offence, that the hymen should be ruptured, provided it is clearly proved that there was penetration; but where that is so very near to the entrance, and has not been ruptured, it is very difficult to come to the conclusion that there has been penetration, so as to sustain a charge of rape.⁴

In *Reg. v. Jordon*, WILLIAMS, J., said: I think it is impossible to lay down any express rule as to what constitutes penetration. All I can say is, that the parts of the male must be inserted in those of the female, but I cannot suggest any rule as to the extent.⁵

6. *Of the Medico-Legal Inquiries to be Made.*

Medical evidence in cases of rape, is seriously affected by circumstances over which the physician can have no control. One of the most important of these is, the want of an examination at a sufficiently early period to afford useful results. In genuine cases, where rape has been really attempted, the local marks of violence are often extremely insignificant, and consequently soon disappear. A slight contusion of the genitals, a laceration of the hymen, or a trifling discharge of blood, are the sole indications of the transaction, and may within forty-eight hours be no longer present.⁶

Professor DEAN, in his work on medical jurisprudence (25, *et seq.*), says: The two main facts to be made out on an indictment for rape are: 1st. Forcible penetration. 2d. In cases of females

¹ 2 Arch. Cr. Pr., 165, note.

² 2 R. S., 736, § 20.

³ 1 East. P. C., 438.

⁴ *Reg. v. McRue*, 8 C. & P., 641.

⁵ 9 C. & P., 118.

⁶ Wharton & Steele, Med. Jurisprudence, § 426.

over ten years of age, that the force used was against the will of the injured party.

In this inquiry the main points, to which the attention is to be directed, are the following:

1. What are the marks of violence, if any discernible, in the organs themselves.
2. What marks or indications of actual violence upon the person, either of the prosecutrix or of the prisoner.
3. What marks, or spots of blood, or stains, caused by the spermatic fluids, on the clothes of the prosecutrix or prisoner.
4. What evidence of gonorrhœa or syphilis, in one or both of the parties.
5. The relative age, strength, constitution, habits, situation, circumstances, mental powers, and propensities of both the prosecutrix and the prisoner.

• It must not be supposed that the presence of bruises or other injuries, upon the person of the prosecutrix, is conclusive evidence that consent was not given. They may have been:

1. Self-inflicted, with the view to sustain her testimony and to make out the case on the part of the prosecution.
2. Notwithstanding the violence, the conduct of the female may have been such as to imply consent on her part.
3. She may have consented after the infliction of the violence. The two latter are perhaps hardly consistent with a resort to any very great degree of violence.

When the accused and the accuser are both in the full possession of health and strength and of the ordinary amount of physical and mental power, the perpetration of this crime must be of difficult if not of impossible occurrence. The opinion of medical jurists generally is against the strongest probability, if not possibility, of its full and perfect accomplishment. Where, under such circumstances, the woman retains her mental powers unimpaired and also her bodily, except so far as they may be exhausted by her efforts at resistance, although the attempt may be made, yet its successful consummation, under these circumstances, must be certainly, to say the least of it, a very rare occurrence. It may, however, be true that the female may possess less coolness and deliberation in husbanding her strength, and, by an early expenditure of more than may be necessary, sooner produce a state of exhaustion,

The following are the usual exceptions where the crime may be perpetrated, notwithstanding the parties may approach nearly to a mental and physical equality:

1. Where narcotics or intoxicating liquids have been administered to her.

2. Where she falls into a state of syncope, from terror and exhaustion.

3. Where many are engaged against her, and in such case there are usually many marks of injury about her person.

4. Where she yields under the influence of some severe threat, such as that of death or duress.

The crime may be perpetrated under any of these circumstances, none of which will furnish any excuse or palliation.

7. Rape on Children Under Ten Years of Age.

As has been seen by our statute, in committing this offence it is not necessary that any force should be used; which is an essential fact necessary to be proved where the prosecutrix is of ten years or upwards. The consideration of offences of this character is to be had without any reference to the consent or non-consent of the child, which is considered as immaterial. Clear and distinct evidence ought to be given that the child is under ten years of age.¹ Evidence by the child herself that she was ten years old on a particular day, her mother being sick at home and her father being unable to state the precise time of her birth, was held insufficient.² A postponement of the trial will be had when the child was of such tender age that she was not capable of giving testimony.³

8. Whether Prisoner can be Convicted of an Assault with Intent to Commit a Rape upon a Female under Ten Years of Age, when she gave her Consent.

It has already been stated that upon an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, if the prisoner be acquitted on the count for an assault with intent to commit a rape, on the ground that the prosecutrix consented, he cannot be convicted on

¹ 1 Russ. on Cr., 694.

² Reg v. Day, 9 C. & P., 722.

³ 1 Leach, 430.

the count for a common assault. Although, so far as the commission of this crime itself is concerned, under our statute it makes no difference, where the female is under ten years of age, whether consent be given or not. A question seems to have arisen, under a similar English statute, whether a party could be convicted for assault with intent to commit the offence upon a female under the age of ten years, when she gave her consent. The principle of law involved was whether in law there could be an assault unless it be against *consent*; and the courts held in some cases that the indictment should have been for an attempt to commit the offence, and not for an assault with intent to commit it.¹

In *Reg v. Day*, COLERIDGE, J., observed: "There is a difference between consent and submission. Every consent involves a submission, but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting. On the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will, therefore, say whether the submission of the prosecutrix was voluntary on her part or the result of fear, under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment."²

In *The Peo. v. Stamford*, which was an indictment for an assault with intent to commit a rape upon an infant of seven years of age, it was uncertain whether the act was committed with or without her consent, and the counsel for the prisoner held it was the duty of the jury to acquit. The court said the statute of Elizabeth and the act of Assembly of New York had made an innovation in the common law. Formerly force was necessary in the commission of a rape in all cases; now, by the statute above mentioned, carnal knowledge of an infant under ten years of age was felony, whether she consented or not. It was obvious the statute did not apply to an attempt to commit a rape. It was therefore as at common law; but that it was almost impossible to suppose consent from an infant of seven years of age, that the

¹ 1 Russ. on Cr., 697.

² 9 C. & P., 722.

act was obviously against her will, and that the presumption of law was so strong as to admit of proof of force.¹

9. *Principals and Accessories.*

All persons present aiding, assisting or encouraging a man to commit a rape may be indicted as principals in the second degree, whether they be men or women.²

Under the common law, when it was held that a boy under the age of fourteen could not be convicted of a rape, it was nevertheless held that, if he aids and assists another person in the commission of the offence, he is not the less a principal in the second degree if it appear, under all the circumstances, that he had a mischievous disposition.³

It was also held that the husband of a woman may be likewise guilty as a principal in the second degree by assisting another person to commit a rape upon his wife; for though in marriage the wife has given up her body to her husband, yet he cannot compel her to prostitute herself to another.⁴

XXXVI. RECEIVING PROPERTY WHICH HAS BEEN STOLEN OR EMBEZZLED.

At the common law, receivers of stolen goods were punishable only as for a misdemeanor, even after the thief had been convicted of felony in stealing them.⁵ But by the New York statute the offence is, in the discretion of the court, punishable either as a felony or as a misdemeanor, and the provisions of the Revised Statutes are made applicable both to property taken by larceny and by embezzlement.

1. *Statutory Enactments.*

Every person who shall buy or receive in any manner, upon any consideration, any personal property of any value whatsoever, that shall have been feloniously taken away or stolen from any other, knowing the same to have been stolen, is guilty of a felony.⁶

¹ 2 Whee. Cr. Cas., 152.

² 1 Hawk., ch. 41, § 10.

³ 4 Blac. Com., 211; 1 Hale, 630; 3 C. & P., 396.

⁴ 1 St. Tr., 387; 1 Hale, 629.

⁵ Fost., 373; 1 Hale, 530, 616.

⁶ 2 R. S., 680, § 73.

In any indictment for such offence it shall not be necessary to aver, nor on the trial thereof to prove, that the principal who stole such property has been convicted.¹

Every person who shall in any way receive any money, goods, right in action, or any valuable security or effects whatever, knowing the same to have been embezzled, taken or secreted contrary to the provisions of the Revised Statutes, shall, upon conviction, be punished in the same manner and to the same extent as is prescribed upon a conviction of a servant for such embezzlement.²

2. *Of the Guilty Knowledge.*

The intent, as in larceny, is the chief ingredient of the offence.³ The language of the statute is "knowing the same to have been stolen or embezzled."⁴

In order to constitute the crime of receiving stolen goods, knowing them to have been stolen, the stolen property must be received feloniously, or with intent to secrete it from the owner, or in some other way to defraud him of the property. Though the statute is silent as to the intent of the receiver, it must be construed according to its manifest object, which is to punish persons who receive stolen property, to defraud the owner of his property.⁵

A receiver of goods, knowing them to have been stolen, with intent to extort from the owner, a reward for delivering them to him, is within the prohibition of the statute.⁶ Thus, a police justice, having learned that bonds had been stolen from a bank, procured an interview with agents of the bank, in which he proposed to procure a restoration of the property if they would pay a certain reward. This was agreed to, and he procured and brought the property to them, and then procured the reward. The jury found that he procured the agency from the bank, under a previous arrangement with the thief, intending to make a profit to himself from the crime, but concealed this intent from the bank, and it was held that he was punishable as a receiver.⁷

¹ 2 R. S., 680, § 74.

² 2 R. S., 678, § 63.

³ *Cassels v. State*, 4 Yerg., 149.

⁴ *Supra*.

⁵ *Peo. v. Johnson*, 1 Park. Cr. R., 564.

⁶ *Peo. v. Wiley*, 3 Hill, 194.

⁷ *Id.*

3. *What Amounts to a Receipt, Manual and Constructive Possession.*

A manual, possession or touch is unnecessary in order to sustain a conviction; it is sufficient if there is a control by the receiver over the goods, and a person having joint possession with the thief, may be convicted as a receiver. A conviction for receiving is good, although a conviction for stealing would have been supported by the same evidence, if the jury had so found.¹ It is necessary that there should be some control over the property by the alleged receiver; thus, it was held that C, the prisoner, did not receive certain fowls which were stolen, as they all along remained in the manual possession of A and B, and were never under C's control, and it was not the intention of A and B that C should have them, except on the contingency, which never happened, of his completing a bargain for them.²

4. *Principals and Accessories.*

It was held in an English case, that if two prisoners are charged jointly with receiving stolen goods, a joint act of receiving must be proved, and proof that one received in the absence of the other, and afterwards delivered to him, will not be sufficient. Successive receivers are all separate receivers, and punishable as such.³

But in cases of joint receivers, it is held in this State, that where several persons are indicted for feloniously receiving embezzled goods, knowing them to have been embezzled, all who are proved to have confederated in the transaction may be convicted, though the receiving was at different times and places, and though all were not present.⁴

If a servant commit a larceny at the time he gives his master's goods to an accomplice, both are principals. If a servant commit a larceny and afterwards deliver the goods to his accomplice, the latter is a receiver.⁵

5. *Place of Trial.*

In the cases where any person shall be liable to prosecution as the receiver of any personal property that shall have been felon-

¹ Reg v. Smith, 1 Lead. Cr. Cas., 576.

² Reg v. Wiley, 1 Lead. Cr. Cas., 582.

³ Rex v. Messingham, R. & M. C. C. R., 257.

⁴ Peo. v. Stein, 1 Park. Cr. R., 202.

⁵ Rex v. Butteris, 6 C. & P., 147; Reg v. Gruncell, 9 C. & P., 365.

iously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property notwithstanding such theft was committed in another county.¹

6. *Of the Value.*

In order to constitute the offence of receiving stolen goods, it is sufficient if the thing be of some value, however small.²

XXXVII. ROBBERY.

According to BLACKSTONE, robbery is designated as a species of larceny from the person. By that eminent writer larceny from the person was divided into two kinds. He says larceny from the person is either by privately stealing or by open and violent assault, which is usually called robbery.³ And in section 242 Book IV., he further says: "Open and violent larceny from the person, or robbery, the *raptina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or by putting him in fear.⁴ And the 1st. There must be a taking, otherwise it is no robbery. 2d. It is immaterial of what value the thing taken is, a penny as well as a pound thus forcibly extorted makes a robbery. 3d. The taking must be by force or by a previous putting in fear, which makes the violation of the person more atrocious than private stealing, and that this previous violence or putting in fear is the criterion which distinguishes robbery from other larcenies.

Three elements are necessary to constitute the offence of robbery as it is generally understood: 1. A taking of property from the person or presence of its possessor. 2d. A wrongful intent to appropriate it. 3d. The use of violence or fear to accomplish the purpose. The first and second of these elements, the third being wanting, constitute simple larceny. The first and third without the second, amount at most to a trespass. The second and third, without the first, constitute an attempt to rob.⁵

1. *Definition by Statute.*

First Degree.—Every person who shall be convicted of feloniously taking the personal property of another from his person

¹ 2 R. S., 727, § 43; Wells v. Peo., 3 P. Cr. R., 473.

² Peo. v. Wiley, 3 Hill, 194.

³ 4 Blac. Com., 241.

⁴ 1 Hawk. P. C., 95.

⁵ Report of N. Y. Penal Code, 1864.

or in his presence and against his will, or by violence to his person, or by putting such person in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree.¹

The essential facts necessary to constitute robbery in the first degree, under our statute, are:

1st. The felonious taking of the personal property of another.

2d. From his person or in his presence.

3d. Against his will.

4th. By violence to his person, or by putting such person in fear of some immediate injury to his person.

Second Degree.—Every person who shall be convicted of feloniously taking the personal property of another in his presence or from his person, which shall be delivered or suffered to be taken through fear of some injury to his person or property, or to the person of any relative or member of his family, threatened to be inflicted at some different time, which fear shall have been produced by the threats of the person so receiving or taking such property, shall be adjudged guilty of robbery in the second degree.²

2. Of the Taking and Felonious Intent.

There must be a taking, otherwise it is no robbery;³ and it must be directly from his person or in his presence, otherwise it is no robbery.⁴ Not only a taking in fact but a taking in law is sufficient to constitute a robbery.⁵ Where the thief receives money, etc., by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards, while the fear of menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party as if he had actually taken it out of his pocket.⁶ Thus, if upon A assaulting B and bidding him deliver his purse, B refuse so to do, and then A pray B to give or lend him money, and B does so accordingly under the influence of fear, the taking will be complete.⁷

¹ 2 R. S., 677, § 57.

² Id.

³ 4 Black., 242.

⁴ Comyns, 478; Stra., 1015.

⁵ 1 Hale, 532; 1 Inst., 68.

⁶ 2 East. P. C., 711-714.

⁷ 1 Hale, 533.

The taking must, in all cases, be accompanied with a felonious intent or *animus furandi*, but if a man, *animo furandi*, say "Give me your money;" "Lend me your money;" "Make me a present of your money," or words of like import, they are equivalent to the most positive order or command; and if anything be obtained in consequence, such taking will be within the definition of robbery.¹

Questions in regard to the felonious intent have arisen where the property has been taken under color of a purchase. Thus, where a traveler met a fisherman with fish, who refused to sell him any, and he by force and putting in fear, took away some of his fish, and threw him money, much above the value of it, judgment was respited because of the doubt whether the intent was felonious on account of the money given.²

It is suggested, however, that questions of this kind should properly be referred to the consideration of the jury, and that the circumstances of the full value, or more being offered at the time, should be left to them, to show that the intention of the party was not fraudulent, and so not felonious.³ It seems clear that if a person, by force or threats, compels another to give him goods, and by way of color, oblige him to take, or if he offer him more than the value, it is robbery.⁴ But it is doubted whether forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.⁵ It does not, however, necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent therefore is not felonious; yet it is submitted that such a circumstance would be pregnant evidence in the negative.⁶ There are some cases of considerable nicety where, though the original assault was clearly with a felonious intent, the taking of the goods was held to be no more than a trespass. Thus, A assaulted B in the highway, with a felonious intent, and searched the pockets of B for money, but finding none he pulled of the bridle of B's horse, and threw that and so

¹ By Wilkes, J., delivering the opinion of the judges in *Donnelly's Case*, Leach, 196.

² 2 East. P. C., 661.

³ Id.

⁴ *Rex v. Simmons*, 2 East. P. C., 712.

⁵ 4 Bla. Com., 244; 1 Hawk. P. C., ch. 34, § 14.

⁶ 2 East. P. C., 662.

bread, which B had in pannels about the highway, but did not take anything from B, it was resolved, upon a conference of all the judges that this was not robbery, because nothing was taken from B. But it was remarked upon this case, that the better reason for the decision seems to be that the particular goods were not taken with a felonious intent, as surely there was a sufficient taking and separation from the person.¹

The taking must not precede the violence or putting in fear.

A thief clandestinely stole a purse, and on its being discovered in his possession, denounced vengeance against the party if he should dare to speak of it, and then rode away. It was held to be simple larceny only, and not robbery, as the words of menace were used after the taking of the purse.² The principle here laid down is that a subsequent putting in fear or violence will not make a precedent taking amount to robbery where the same is effected clandestinely or without putting in fear or violence. By the taking necessary in this offence is implied that the robber must be in the *possession* of the thing stolen. So that if a man, having a purse fastened to his girdle, be assaulted by a thief, and the thief, in order the more easily to take the purse, cut the girdle, and the purse thereby fall to the ground, this is no taking, for the thief never had the purse in his possession. But if the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, this would have been a taking, though he had never taken it up again, for the purse would have been once in his possession.³ And, upon the same principle, where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could take it up, so as to remove it from the spot where it lay, the judges were of opinion that the offence of robbery was not completed.⁴

It is not necessary that the property should continue in the possession of the thief. When a robber took a purse of money from a gentleman and returned it to him immediately, saying,

¹ 2 East. P. C., 662.

² 1 Hale, 534.

³ 1 Inst., 69; 1 Hale, 533.

⁴ Farrell's Case, 1 Leach, 322.

"If you value your purse, you will please take it back and give me the contents of it," but was apprehended and secured before the gentleman had time to give him the contents of the purse; the court held that there was sufficient taking to constitute the offence, although the prisoner's possession continued only for a instant.¹

When the offence of robbery is once actually completed by taking the property of another into the possession of a thief, it cannot be purged by any subsequent redelivery.² Thus, if A requires B to deliver his purse, and he delivers it accordingly, when A, finding only two shillings in it, gives it to him again, yet this is a taking by robbery.³

While a lady was stepping into her carriage the prisoner snatched at her diamond ear-ring and separated it from her ear by tearing her ear entirely through, but there was no proof of the ear-ring ever having been seen in his hand; and upon the lady's arrival at home, it was found amongst the curls of her hair. The judges, upon a case being submitted for their consideration, were all of opinion that there was a sufficient taking from the person to constitute robbery. They thought that it was sufficient as the ear-ring was in the possession of the prisoner, separated from the lady's person, though but for a moment, and though he could not retain it, but probably lost it again the same instant.

If the party *bona fide* believes that property in the person's possession of another belongs to him, take that property away from such person with menaces and violence, this is not robbery and it is for the jury to say whether or not the prisoner did act under such *bona fide* belief.⁴

3. *From the Person of the Prosecutor or in His Presence.*

The taking need not, however, be immediately from the person of the owner. It will be sufficient if it be in his presence.

Where, however, it appeared upon a special verdict that some thieves gently struck the prosecutor's hand, whereby some money which he had taken out from his pocket to give change, fell

¹ Peat's Case, 1 Leach, 228.

² 1 Hawk. P. C., ch. 34, § 2.

³ 1 Hale, 533.

⁴ Lapree's Case, 1 Leach, 320.

⁵ 1 Russ. on Cr., 872; 3 C. & P., 400.

the ground, and that upon his offering to take it up the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and that the thieves "then and there *immediately*" took it up, a great majority of the judges held that even by this statement it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding.¹

On an indictment for robbery it appeared that the prosecutor gave his bundle to his brother to carry for him, and while they were going along the road the prisoners assaulted the prosecutor, upon which his brother laid down the bundle in the road and ran to his assistance, and one of the prisoners then ran away with his bundle. VAUGHN, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was the felonious taking of the property of another by violence, against his will, either from his person or in his presence. The bundle in this case was not in the prosecutor's possession.²

In a case where robbers, by putting in fear, made a wagoner drive his wagon from the highway in the day time, but did not rob the goods till night, much doubt appears to have been entertained—some holding it to have been a robbery from the first force, but others having considered that the wagoner's possession continued till the goods were actually taken, unless the wagon was driven away by the thieves themselves.³

In a case where the prisoner had obtained a note of hand from a gentleman by threatening, with a knife held to his throat, to take away his life, and it appeared that the prisoner had furnished the paper and ink with which it was written, and that the paper was never out of her possession, it was held not to be robbery.⁴

A robbery cannot be committed unless the party has the property in his peaceable possession, to do with it what he chooses.⁵

¹ Rex v. Francis, 2 Str., 1015.

² Rex v. Fallows, 5 C. & P., 508.

³ 2 East. P. C., 707.

⁴ Phepoe's Case, 2 Leach, 673.

⁵ Rex v. Edwards, 6 C. & P., 521.

If A, being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away, or while A is flying from the thief he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A, will be sufficient.¹ So it has been said that if a man's servant be robbed of his master's goods in the sight of his master, this shall be taken for a robbery of the master.² If the thief, having first assaulted A, takes away his horse standing by him, or having put him in fear, drives his cattle in his presence out of his pasture, he may be properly said to take such property from the person of A, for he takes it openly and before his face, while under his immediate and personal care and protection.

4. *Of the Taking of the Property Against the Will of the Party*

It is one of the essential facts necessary to constitute robbery in the first degree, that it should be taken against the will of the prosecutor. In an English case, the party upon whom the robbery was alleged to have been committed, consented to the fact for a base purpose, and it was holden to be no robbery. On *Salmon* and several others, in order to obtain for themselves the rewards given by act of Parliament for apprehending robbers upon the highway, concerted a plan by which a robbery might be effected upon *Salmon* by a person named *Blee*, who was one of the confederates, and two strangers procured by *Blee*. It was expressly found that *Salmon* was a party to the agreement; that he consented to part with his money and goods under color and pretence of a robbery, and that for such purpose, and in pursuance of this consent and agreement, he went to a highway at *Deptford*, and waited there until the colorable robbery was effected. The judges were of the opinion that, in consideration of law, no robbery was committed upon *Salmon*, and the reason given was, that his property was not taken against his will.³

5. *Of the Violence and Force or Fear of Injury.*

As before stated, *BLACKSTONE* says it is the violation of the person which makes robbery more atrocious than privately stealing.

¹ 3 Inst., 68; 1 Hale, 533.

² *Rex v. Wright*, Style, 156.

³ 4 Blac., Com., 243; 1 How. P. C., ch. 34, § 6; 1 Hale, 533.

⁴ *Rex v. McDaniel et al.*, Fost., 121-128.

ing, and is the criterion which distinguishes robbery from other larcenies. Under the common law it was said the principle, indeed, of robbery was violence; but it was often holden that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as a constructive violence.¹ If one privately steals sixpence from the person of another, and afterwards keeps it, by putting him in fear, this is no robbery, for the fear is subsequent.²

Where it is laid in the indictment, that the robbery was committed by putting in fear, this does not imply any great degree of terror or fright in the party robbed; it is enough that so much force, or threatening by word or gesture, be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent.³

If a person with a sword drawn, begs an alms, and I give it to him through mistrust and apprehension of violence, this is a felonious robbery.⁴ So, if under a pretence of sale, a man forcibly extorts money from another, the subterfuge will not avail him.⁵ Where the prisoner took a quantity of wheat worth eight shillings, and forced the owner to take thirteen pence half-penny for it, threatening to kill her if she refused, the offence was clearly holden to be robbery by all the judges, upon a conference.⁶ In 1 Leach, 280, Justice ASHURST says the true definition of "robbery," is the stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property, and whether terror arises from real or expected violence to the person, or from a sense of injury to the character, makes no kind of difference, for to most men, the idea of losing their fame and reputation, is equally, if not more terrific, than the dread of personal injury. The principal ingredient in robbery, is a man's being forced to part with his property, and the judges are unanimously of opinion that, upon the principles of law, as well as the authority of former decisions, a threat to accuse a

¹ 2 East. P. C., 727-735; 2 Leach, 196-619.

² 1 Hale P. C., 534.

³ Fost., 128.

⁴ 1 Hawk. P. C., 96.

⁵ Black., Bk. iv., 243.

⁶ Simon's Case, Cornwall Lent Ass., 1773.

man of the greatest of all crimes, is a sufficient force to the crime of robbery, by putting in fear. Also, a fear character and service upon a charge of sodomitical p sufficient to constitute robbery, though the party has being taken into custody, or of punishment.¹

The last two decisions were at common law, and it supposed that our statute, embracing only fear of inju son or property, did not include those cases in which was of injury to the character of the person robbed. a large number of English cases reported, where the was taken, by threats, inducing a fear of injury to the which will be found treated of in Russell on Crimes (*v et seq*).

In the *People v. McDaniels* (1 Park. Cr. R., 198), it that a robbery may be committed by extorting persona from the person, or in the presence of the owner, by threats of an unfounded criminal charge, where such p obtained through fear produced by such threats.

In the above case, by means of a threat to arrest cutor on a charge of having been guilty of the crin nature (the charge being groundless and known to be defendant), the prosecutor, through fear of such threats was induced to deliver to the defendant twenty doll receipt for thirteen dollars, owed by the defendant to cutor, and to promise to pay to the defendant twer more. Held, that the defendant was guilty of robb second degree. It is not necessary to constitute su that the charge against the prosecutor should be direct be made in unequivocal language. It is enough if the used was intended to communicate such a charge, as understood at the time by the prisoner.

The cases of robbery in which the property has been by means of a fear being excited of injury to the cl the party robbed, appear to be all of one description. it has been said that the terror which leads a party to an injury to his character, has never been deemed su support an indictment for robbery, except in the instance of its being excited by means of insinuations

¹ R. & R. C. C., 375.

threats to destroy the character of the party pillaged by accusing him of sodomitical practices.¹

If thieves meet a person and by menaces of death make him swear to bring them money, and he, under continuing influence of fear of his life, complies, this is robbery in them, though it would not be so if he had no personal fear, and acted merely from a superstitious regard to an oath so extorted.²

To constitute robbery where an actual violence is relied upon, and no putting in fear can be expressly shown, there must be a struggle or at least a personal outrage. So that to snatch property suddenly from the hand, to seize a parcel carried on the head, to carry away a hat and wig without force, and to take an umbrella of a sudden, have been respectively holden to be mere larcenies.³

In a case tried in this State it was said that the mere snatching of a thing from the hand or person of another, without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery. Where the court instructed the jury that feloniously taking another's property, with violence sufficient to constitute an assault and battery, would make out the crime of robbery, it was held to be erroneous, and the prisoner having been convicted under such a charge, the judgment was reversed. Where the property is not obtained by putting the person in fear of immediate injury to the person, the violence necessary to make the offence amount to robbery must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance.⁴

In the absence of force to constitute robbery the fear must arise before and at the time of the property being taken. It is not enough that it arise afterwards. And where the prisoner by stealth took some money out of the prosecutor's pocket, who turned round, saw the prisoner and demanded the money, but the prisoner threatening him, he desisted, through fear, from making any further demand, it was held no robbery.⁵ But snatching an article from a man will constitute robbery if it is

¹ 2 Arch. Cr. Pr., 511.

² 1 East. P. C., 714.

³ 1 Leach, 290, and notes.

⁴ McCloskey v. The Peo., 5 Park. Cr. R., 299.

⁵ Roll. Rep., 154; 1 Hale, 534.

attached to his person or clothes so as to afford resistance where the prosecutor's watch was fastened to a steel chain went around his neck, and the seal and chain hung from him and the prisoner laid hold of the seal and chain and pulled the watch from the fob, but the steel chain still secured it, but two jerks the prisoner broke the steel chain and made off with the watch, it was held a robbery, for the prisoner did not use force at once, but had to overcome the resistance the steel chain made, and actual force was used for that purpose.¹ So, where a man tore an ear ring from the ear, and in so doing lacerated the flesh.² And where a heavy diamond pin was used as a corkscrew stock, and which was twisted and strongly fastened in a lady's hair, the judges came to the same decision.³

Where a man snatched at the sword of a gentleman hanging on his side, and the latter, perceiving his design, laid hold of the scabbard, on which a contest ensued, and the thief succeeded in wresting the weapon from its owner, his offence was held to be robbery.⁴

It is not necessary that actual fear should be strictly and precisely proved, as the law in *odium spoliatoris* will presume where there appears to be a just ground for it.⁵

The cases in which the crime of robbery has been committed by means of fear of injury to the property of the party principally those in which the terror excited was of the property or outrages of a mob. The prisoner, who was a ringleader in riots among the tinnerns in Cornwall, came, with about seven of his companions, to the house of the prosecutor and said that they would have from him the same as they had from his neighbor, namely, a guinea, or else they would tear his roof of corn level his house. He gave them a crown to appease them, the prisoner swore that he would have five shillings more, the prosecutor, being terrified, gave them. They then opened a cask of cider by force, drank part of it, and eat the prosecutor's bread and cheese, and the prisoner carried away a piece. The indictment contained two counts—one for robbing the prosecutor.

¹ R. & R. C. C., 419.

² 1 Leach, 320.

³ Id., 335.

⁴ Id., 290, and notes.

⁵ 1 Fost., 128.

of ten shillings in his dwelling house, by assault and putting him in fear, and the other for putting the prosecutor in fear and taking from him, in his dwelling house, a quantity of cider, pork and bread. It was holden robbery in the dwelling house.¹

The words of the definition of robbery are in the alternative "violence or putting in fear;" and if it appears that the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery.²

Under the common law it seems to have sometimes been considered that fear is a necessary ingredient in all cases of robbery, even in those effected by actual violence,³ but if so it will be presumed. There are cases of this description in which fear can hardly be supposed to have existed, as if a thief take a man by the cravat, squeeze him against a wall, and in the meantime abstract his watch from his fob, without his knowledge. This is a robbery, though the plaintiff was not afraid nor aware of the robber's intent.⁴ So, also, if a man be knocked down, without previous warning, and stripped of his property while senseless, he cannot with propriety be said to be put in fear, and yet that would undoubtedly be robbery.⁵ Though the violence be used for a different purpose than that of obtaining the property of the party assaulted, yet, if the property be obtained by it, the offence will, under some circumstances, at least, amount to robbery, as where money was offered to a party endeavoring to commit a rape and taken by him.⁶

The fear of injury to the person is that which is commonly excited on the commission of this offence; and where property is obtained by this means, it will amount to robbery, though there be no great degree of terror or affright in the party robbed. It is enough if the fact be attended with such circumstances of terror, such threatening, by word or gesture, as in common experience are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person.⁷

¹ 2 East. P. C., 731.

² Id., 708.

³ Fost., 128.

⁴ Com. v. Snelling, 4 Binn. Rep., 379.

⁵ Fost., 128.

⁶ Blackman's Case, 2 East. P. C., 711.

⁷ 4 Black. Com., 243; 1 Leach, 197.

Violence or threats, reasonably calculated to put a man in fear, are essential to constitute robbery.¹

6. *Of the Value of the Property.*

It is immaterial of what value the thing taken is.² It is the nature of the circumstances attending the commission of the offence that constitutes robbery. The trifling value of the property taken does not qualify the offence.

In 5 Carr & P., 602, *Rex v. Bingley*, the property taken was a slip of paper containing a memorandum of a debt due to a person robbed. It was held that the offence was robbery, withstanding the small value of the paper. That the prosecutor showed, by carrying the memorandum in his pocket, that he considered it of some value.

But something must be taken and it must be of some value, otherwise the offence will be only that of an assault with intent to rob, but it need not be of the value of any known coin, or of a farthing.³

7. *Attempts to Rob by Means of Threatening Letters.*

Every person who shall knowingly send or deliver, or cause to be made, and for the purpose of being delivered or sent, shall with the possession of any letter or writing, with or without name subscribed thereto, or signed with a fictitious name, or any letter, mark or other designation, threatening therein to accuse any person of any crime, or to do any injury to the person or property of any one, with a view or intent to extort or obtain any money or property of any description belonging to another, shall, upon conviction, be adjudged guilty of an attempt to rob.

Where threatening letters are written and mailed in one county and directed to and received by the person to whom they are addressed in another county, the indictment for sending threatening letters should be found in the latter county.⁴

The statute against sending threatening letters, with the intent to extort, etc., was intended to embrace only cases where

¹ 2 City H. Rec., 167; 2 Id., 86.

² 1 Hawk. P. C., 95.

³ 1 Russ. on Cr., 869.

⁴ 2 R. S., 678, § 60.

⁵ *Peo. v. Griffin*, 2 Barb., 427.

intent is to obtain that which, in justice and equity, the writer of the letter is not entitled to receive. It does not extend to cases where the person threatened actually owes the writer of the letter the sum claimed by him. To support an indictment under that statute, the end as well as the means employed to obtain it must be wrongful and unlawful.¹

Prior and subsequent letters from the prisoner to the party threatened may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed.²

8. *When a Party may be Punished for a Robbery Committed in Another County.*

When property stolen in one county and brought into another shall have been taken by robbery, the offender may be indicted, tried and convicted for such robbery in the county into which the stolen property was brought, in the same manner as if the robbery had been committed in that county.³

9. *Principals and Accessories.*

If several acting in concert be present at a robbery, all are guilty, as well those who use violence or take the property as those who do not.⁴ The same general rules which apply in other cases of principal and accessories apply also in cases of robbery.⁵ But where a gang of poachers consisting of the prisoners and one Williams attacked a game keeper, beat him and left him senseless on the ground, and then went away, but Williams returned, and whilst the game keeper was insensible took from him his gun, pocket-book and money, it was held that this was robbery in Williams only.⁶

If A, B and C come to commit a robbery, and A stand sentinel at a hedge corner to watch if any person should come, and B and C commit the robbery, it will be robbery in A also, though he was at a distance from them and not within view.⁷ If several

¹ *Peo. v Griffin*, 2 Barb., 427.

² 2 East P. C., 1110.

³ 2 R. S., 727, § 50.

⁴ 1 Hawk., ch. 34, § 5.

⁵ 1 Russ. on Cr., 901.

⁶ *Rex v. Hawk et al.*, 3 Car. & A., 392.

⁷ 1 Hale, 534-537.

persons come to rob a man, and they are all present, and one only actually takes the money, it is robbery in all.¹ The principal of several persons engaged in one common design, being in the eye of the law present when the fact is committed, has been carried to a considerable extent in the case of robbery.²

XXXVIII. SEDUCTION UNDER PROMISE OF MARRIAGE.

Any man who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character, is liable to be punished as for a felony.³

By the statutory enactment in this offence, it is necessary that the indictment should be found within two years after the commission of the offence, and no conviction can be had on the testimony of the female seduced unsupported by other evidence, and the subsequent marriage of the parties may be plead in bar of a conviction.⁴

To an indictment for the seduction of an unmarried female under the above act, the defendant interposed a special plea alleging that at the time of the committing of the acts charged, the defendant was, and for five years previous thereto had been a married man, having a living wife and family, with which wife and family he was then living, all of which at the time of the alleged promise and seduction was well known to the said female. A demurrer was interposed to such special plea, and the facts thus set up were held to constitute a good defence to the prosecution, and judgment was given for the defendant.⁵

By the words "previous chaste character" the statute means personal chastity, actual character, not reputation.⁶

It is sufficient, under the statute, that the defendant effected his object by a conditional promise that, if the illicit connection were permitted, he would marry her.⁷ Where the illicit intercourse between the prosecutrix and the defendant, began more than two years before the indictment found, and continued until

¹ 1 Hawk. P. C., ch. 34, § 5; 1 Hale, 534.

² 1 Russ. on Cr., 901, and cases cited.

³ Laws 1848, ch. 111.; 2 R. S., 664, § 26.

⁴ Id.

⁵ *Peo. v. Alger*, 1 Park., 333.

⁶ *Crozier v. Peo.*, 1 Park., 453; *Safford v. Peo.*, Id., 474; *Peo. v. Kenyon*, 5 Id., 254.

⁷ *Keryon v. Peo.*, 26 N. Y., 203.

within two years, it was held not a case of seduction within two years, and therefore not within the statute.¹ The language of the act "provided that no conviction shall be had under the provisions of the act, on the testimony of the female seduced, unsupported by other testimony," does not mean or render it necessary that such female should be corroborated on every material statement, or on both the seduction and the promise to marry. If it did, the intention and the operation of the law would be defeated, as the seduction can in scarcely any case be proved, except by the testimony of the person injured, while the promise can be proved by either positive or inferential evidence, either by the defendant's own acknowledgments, or by the manner of his treatment, conduct or expressions used.² But the corroboration of the woman's testimony must be addressed to the ingredients necessary to constitute a crime. Where she was corroborated as to collateral matters but not as to either the promise or the seduction, it was held that there could be no conviction.³ In a prosecution under the statute for seduction, there being no evidence of any express promise by the prosecutrix, the judge charged the jury that if they were fully satisfied, from the evidence, that the defendant promised to marry the prosecutrix, if she would have connection with him, and, she believing and confiding in such promise, and intending on her part to accept such offer of marriage, did so, it was a sufficient promise of marriage under the statute; the Court of Appeals held that the charge was unobjectionable, and that it was not necessary that the promise should be a valid and binding one between the parties. The offence consists in seducing and having illicit connection with an unmarried female under promise of marriage. It is enough that a promise is made which is a consideration for, or inducement to, the intercourse. But if the statute required the promise to be a valid one, the charge was correct. A mutual promise on the part of the female seduced, is implied if she yields to the solicitation of the seducer, made under his promise to marry.⁴

¹ *Safford v. Peo.*, 1 Park., 474.

² *Peo. v. Lomax*, 6 Abb., 141.

³ *Peo. v. Hine*, 8 N. Y. Leg. Obs., 139.

⁴ *Kenyon v. Peo.*, 26 N. Y., 203.

XXXIX. SUBSTITUTING CHILD.

Every person to whom an infant under the age of six years shall be confided for nursing, education or any other purpose, who shall, with intent to deceive any parent or guardian of such child, substitute and produce to such parent or guardian another child in the place of the one so confided, is guilty of a felony.¹

XL. SUBORNATION OF PERJURY.

Every person who shall unlawfully and corruptly procure any witness by any means whatsoever to commit any willful and corrupt perjury, in any cause, matter or proceeding, in or concerning which such witness shall be legally sworn and examined, shall be adjudged guilty of subornation of perjury.²

To render the offence of subornation of perjury complete, either at common law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit will bring the offender within its penalties.³

The criminal solicitation to commit perjury, though unsuccessful, was a misdemeanor at common law, punishable not only by fine and imprisonment, but by corporal and infamous punishment.⁴ And under our statute, as hereafter stated, it is a felony punishable by imprisonment in a State prison.⁵

On a trial for subornation of perjury, where the perjurer suborned to swear on the former trial is admitted as a witness and confesses the perjury, it is not necessary either to prove the perjury or subornation by the other witnesses.⁶

Attempts to Induce Perjury.—Every person who shall, by the offer of any valuable consideration, attempt unlawfully and corruptly to procure any other to commit willful and corrupt perjury as a witness in any cause, matter or proceeding in or concerning which such other person might by law be examined as a witness, shall, upon conviction, be punished by imprisonment in a State prison not exceeding five years.⁷

¹ 2 R. S., 677, § 54.

² 2 R. S., 681, § 3.

³ 3 Mod., 122; 1 Leach, 455, notes.

⁴ 2 East Rep., 17; 1 Hawk., ch. 19, § 10; 6 East, 464.

⁵ § 12, post.

⁶ Francis' case, 1 City H. Rec. 121.

2 R. S., 682, § 8.

XII. TREASON.

The Revised Statutes declare that the following acts shall constitute treason against the people of this State:

1. Levying war against the people of this State within the State; or,

2. A combination of two or more persons, by force, to usurp the government of this State, or to overturn the same, evidenced by a forcible attempt, made within this State, to accomplish such purpose; or,

3. Adhering to the enemies of this State while separately engaged in war with a foreign enemy, in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort in this State or elsewhere.¹

Whenever any person shall be outlawed upon a conviction for treason, the judgment thereupon shall produce a forfeiture to the people of this State during the lifetime of such person, and no longer, of every freehold estate in real property of which such person was seized in his own right at the time of such treason committed, or at any time thereafter, and of all his goods and chattels.²

The following embrace the leading points of what will constitute treason, as decided by the United States courts upon the trial of important cases of treason against the federal government:

War can be levied only by the employment of actual forces. Men must be openly raised; troops must be embodied; yet neither arms nor the actual application of force to the object are indispensably requisite.³ But it is high treason to march in arms, with a marshaled and arrayed force, committing acts of violence and devastation, in order to compel the resignation of a public officer, and thereby to render more inoperative and ineffectual an act of Congress.⁴ All such who perform any part, however minute or remote from the scene of action, when war is levied, if they are leagued in the general conspiracy, commit treason.⁵ But

¹ 2 R. S., 656, § 2.

² Id., § 3.

³ U. S. v. Burr, 4 Cr., 470-476, 481-487-488.

⁴ U. S. v. Fries, 196; U. S. v. Vigol, 2 Dall., 346; U. S. v. Mitchell, Id., 348-256.

⁵ Ballman & S., 4 Cr., 75; U. S. v. Fries, Trial, 167; U. S. v. Burr, 4 Cr., 485.

the traveling of individuals to a place of rendezvous, separately or together, but not in military form, is not treason.¹ Nor a conspiracy to levy war, nor a secret unarmed meeting of conspirators, not in force, nor in warlike form, though met with treasonable intent, nor the actual enlistment of men to serve against the government; but these offences are high misdemeanors.² But the marching of individuals from places of partial to places of general rendezvous has been held to be treason.³

The commissioners of the penal code say that the decisions of the federal courts settle the construction of the phrase levying war, to be where persons rise in insurrection with intent to prevent, in general by force and intimidation, the execution of a statute of the State, or to force its repeal; but that an endeavor, although by force and arms, to resist the execution of law in a single instance and for a private purpose is not levying war.⁴

The common law proceedings for the outlawry of a defendant in criminal cases are abolished. The statutory proceedings for the outlawry of persons convicted of treason will be found in 2 R. S., 744.

XLII. VIOLATION OF ELECTION AND REGISTRY ACTS.

Any inhabitant of another State who shall vote or offer to vote at any general, town or city charter election in this State is to be adjudged guilty of a felony.⁵

In addition to the above violation of the election law, which is by statute declared to be a felony, there are a variety of other violations thereof which are misdemeanors, and will be found mentioned under that title.

If any of the messengers authorized to receive the certified statements of the electoral votes in this State shall be guilty of destroying the certificates intrusted to their care, or of willfully doing any act that shall defeat the delivery of them as directed by law, they are guilty of a felony; and if any person shall be guilty of taking away from any of the said messengers, by force or in any other manner, any such certificates intrusted to his care,

¹ Ballman & S., 4 Cr., 75; U. S. v. Fries, Trial, 167; U. S. v. Burr, 4 Cr., 485.

² 4 Cr., 126-486-126-128.

³ Ball. & S., 4 Cr., 75; U. S. v. Fries, Trial, 167; U. S. v. Burr, 4 Cr., 485.

⁴ Draft Penal Code, § 59.

⁵ Laws of 1839, p. 365, ch. 380, § 14.

or of willfully doing any act that shall defeat the due delivery thereof, as directed by law, he is also guilty of a felony.¹

The statutes further provide in respect to the registry law, that "Any person who shall cause his name to be registered in more than one election district, or who shall cause his name to be registered, knowing that he is not a qualified voter in the ward or district where such registry is made, or who shall falsely personate any registered voter, and any person causing, aiding or abetting any person in any manner in either of said acts, is guilty of a felony. All false swearing before the boards of registration are declared to be willful and corrupt perjury, and punishable as such. And any member or officer of the board of registration who shall willfully violate any of the provisions of the registry act, or be guilty of any fraud in the duties of his office, is also declared to be guilty of a felony."²

XLIII. VIOLATING GRAVES, ETC.

The provisions of the Revised Statutes upon this subject are as follows:

(a) Every person who shall remove the dead body of any human being from the grave or other place of interment, for the purpose of selling the same, or for the purposes of dissection, or from mere wantonness, is guilty of a felony.³

(b) Every person who shall purchase or receive the dead body of any human being, knowing the same to have been disinterred contrary to the provisions of the preceding section, shall, upon conviction, be subject to the like punishment.⁴

(c) Every person who shall open a grave or other place of interment, with intent, 1st, to remove the dead body of any human being for the purpose of selling the same, or for the purpose of dissection, or, 2d, to steal the coffin or any part thereof, or the vestments or other articles interred with any dead body, is guilty of a felony.⁵

¹ Vol. 1, R. S., 5th ed., p. 445, § 18.

² Laws 1859, ch. 380, p. 895, § 14.

³ 2 R. S., 688, § 13.

⁴ Id., § 14.

⁵ Id., § 15.

ERRATA.

On page 16, line 6, for "principai" read "principal," and for "effend" read "offender."

On page 34, in 11th line, after "intent" insert "in."

On page 63, insert a comma after "disposed" in line 12, and after "line 13."

Page 114, 3d line, for "matter" read "mother."

Page 186, in 8th line, from bottom of page, for "courts of session" read "courts of special sessions."

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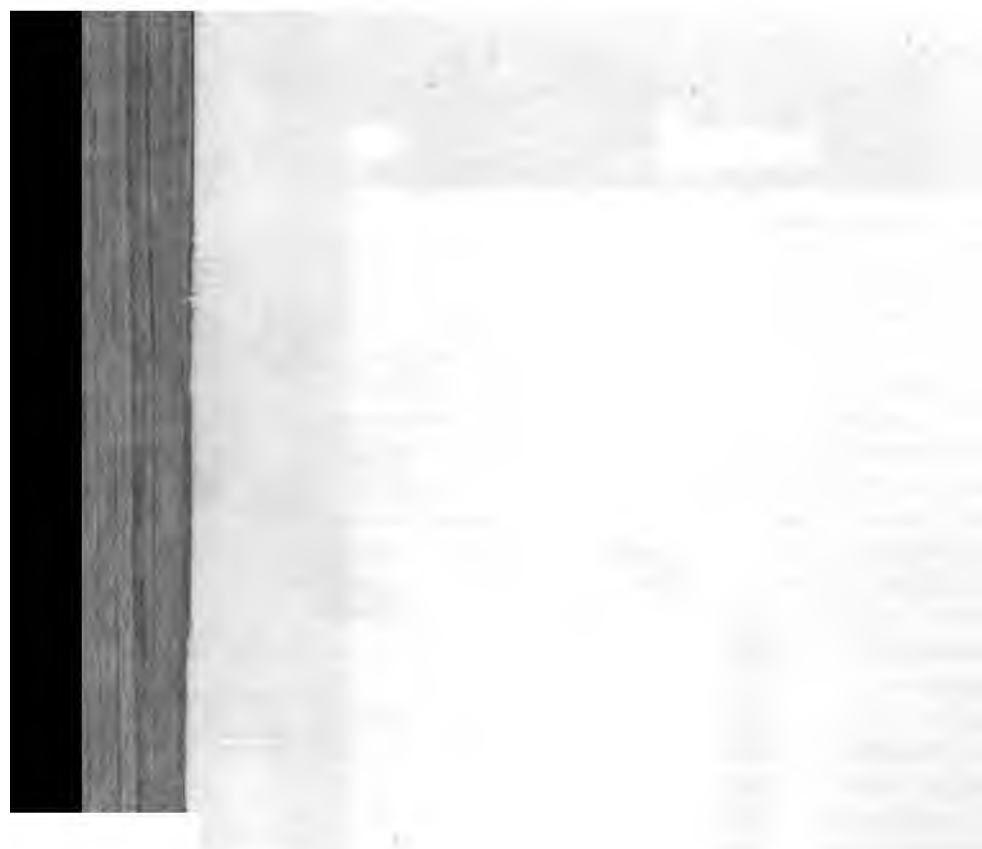
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